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Abstract

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

FEBRUARY TERM, A. D. 1950

General No. 9689 Agenda No. 11

Jewell McAtee,
Plaintiff-Appellant,
vs.
Anna Mantzoros,
Defendant-Appellee.

Appeal from
Circuit Court of
McLean County.

340 I.A. 216

Wheat, P. J.

Plaintiff-appellant Jewell McAtee filed suit for personal injuries claimed to have resulted from a collision between the taxi-cab which he was driving and an automobile driven by defendant-appellee Anna Mantzoros, October 27, 1947, about 8 o'clock P. M. in Bloomington, Illinois. Plaintiff's cab was proceeding south on North Main Street when he stopped at, in or just south of the intersection of a cross street and his car was then struck in the rear by a car driven by defendant which had been travelling on the same street in the same direction. A wilful and wanton count was withdrawn from the consideration of the jury on defendant's motion, and on the negligence count a verdict favoring defendant was returned. Motion for new trial was denied and judgment entered on the verdict.

It is first urged that the verdict is clearly and manifestly against the weight of the evidence. Plaintiff testified that as he was proceeding south at about twenty to twenty-two miles per hour on a dry pavement he gave a hand signal for a left turn about a half block north of the intersection where the collision occurred; that he came to a gradual stop at the intersection;

that his cab had a stop light on each side in the rear; that after coming to a complete stop, waiting for north bound traffic to pass, he saw in his rear view mirror a car, driven by defendant, approaching from the rear about four car lengths behind him at a speed of about thirty to thirty-five miles per hour, which struck his car. Slight damage was done to the rear bumper of the cab, and at the time he stated he was not injured. Later, severe injuries to his neck necessitated lengthy and expensive hospitalization and medical treatment. It does not appear from his testimony that he saw the next witness, William Jepsen, at the scene of the accident.

William Jepsen, a cab driver, testified that he was a fellow-employee of plaintiff; that on the night in question he was driving his cab south on North Main Street about a half block to the rear of defendant's car, which in turn was about three car lengths behind plaintiff's cab; that when somewhere north of the intersection plaintiff gave a hand signal for a left turn; that when thirty-five to forty feet north of the intersection the left rear stop light lit on plaintiff's cab; defendant's car obstructed his view of the right rear light; defendant's car was going twenty-five to thirty miles per hour and witness couldn't tell whether or not it was overtaking the cab; that he believed they were going at the same speed; the pavement was dry; he asked plaintiff if he was hurt to which the reply was that he was not; plaintiff first learned that witness saw the accident after suit was started. On cross-examination he stated that the arm signal was given at a point when plaintiff was thirty-five feet north of the intersection; that plaintiff's cab stopped before it reached the middle of the intersection. The testimony of plaintiff and this witness Jepsen comprises all that was offered by occurrence witnesses on behalf of plaintiff.

The defendant testified that she first noticed the cab about one-half block north of the scene of the accident; that the street was wet; that both her car and the cab were going at about the same rate of speed, fifteen to twenty miles per hour; that the cab crossed the entire intersection and when the front of it was south of the south curb line, extended, of the intersection, it stopped suddenly without any hand signal being given when she was at a point thirty feet behind the cab; she applied the brakes which were in good condition, but was unable to stop until her front bumper hit the rear bumper of the cab, causing little damage to either car; no other car or cab stopped near the two cars after the accident; she didn't see the witness Jepsen there and never saw him until he appeared as a witness.

Tom Shepherd, a witness for defendant, testified that he had just come out of the filling station on the southeast corner of the intersection and was standing on such corner when he noticed the approach of what proved to be plaintiff's cab; the pavement was somewhat damp; the cab crossed the entire intersection and approached the south sidewalk line where witness was standing when it came to a dead stop; the driver gave no hand signal; the floodlights of the filling station were on and as it was "just as bright as it could be" he would have seen any hand signal; the cab and defendant's car were going at about the same rate of speed, with the defendant being forty or fifty feet to the rear; the cab did not slow down as it approached the intersection, and went entirely through the intersection when it made the sudden stop; no other car stopped after the accident and in particular no other cab had stopped; he did not see the witness Jepsen at the time of the accident. The testimony of the defendant and the witness Shepherd comprises all that was offered by occurrence witnesses on behalf of defendant.

The jury was confronted with two theories as to the cause of the collision. That of the plaintiff is to the effect that he gave a hand signal about a half block north of the intersection, slowed down, and with two rear stop lights lighted, came to a gradual stop at the north side of the intersection, on a dry pavement, and was then hit by defendant's car. That of the defendant is to the effect that the pavement was wet, plaintiff gave no signal of any kind, did not slow down gradually, but came to a sudden stop not in the north part of the intersection, but after he had passed entirely through it when his cab was about at the south sidewalk line.

As has been stated repeatedly, when there is a conflict in the testimony it is to be resolved by the jury who heard and saw the witnesses. In this case they apparently believed the testimony of defendant and the witness Shepherd. It cannot be said that the verdict is clearly and manifestly against the wight of the evidence.

Complaint is made as to the giving of certain of defendant's instructions and in the refusing of one of plaintiff's instructions. It is argued that where a case is close on the facts and its decision must be determined upon conflicting testimony, the jury should be accurately instructed. In view of the verdict it is not possible to say that this case was close on the facts. The jury having seen and heard the witnesses had the right to conclude that the witness Jepsen was not at the scene of the accident; they had the right to disbelieve plaintiff's testimony who did not even know that the collision occurred at the intersection of Main and Chestnut Streets (as testified to by his own and defendant's witnesses) but who insisted that there was no doubt in his mind but that it occurred at the intersection of Main and Walnut Streets. Thus, not believing plaintiff and his

witness Jepsen, but believing defendant and her witness Shepherd, this was not a close case. The trial judge, with the opportunity of granting a new trial, and having had the opportunity of seeing and hearing the witnesses, obviously did not so believe.

The refused instruction related to the statutory provision regarding brakes. The only testimony regarding the brakes of defendant's car was her own: that the brakes were in good condition. It was not error to refuse this instruction. While it cannot be said that defendant's given instructions were free from error, it does appear that the jury would have reached no other verdict, having adopted defendant's theory of the case, even if the instruction objected to were technically reworded. Likewise there appears no reversible error in the argument of defendant's counsel to the jury.

In the case of Smith v. Seelbach, 336 Ill.App.480, this court stated: "We have read all of the instructions, and feel that the jury could not have been misled. This was a personal injury case. The issues were not complicated, and we believe that the jury understood what the issues were. We find no error in the giving of the instructions. The plaintiffs appeared to have had a fair trial. If the jury believed their testimony, they would have won the case, but apparently the jury did not believe that the accident happened in the manner in which plaintiffs testified it did happen. Plaintiffs are not now in a position to complain of the jury's decision."

This language is applicable to the instant case. The judgment of the Circuit Court is affirmed.

Affirmed.

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT
February Term, A.D.1950

General No. 9666 Agenda No. 3

MELVIN L. ABRAMS,
Plaintiff-Appellant,
-vs-
MONICA ABRAMS,
Defendant-Appellee.

Appeal from
Circuit Court of
Mason County.

340 I.A. 217

DADY, J.

On May 6, 1948, the plaintiff, Melvin L. Abrams, filed in the Circuit Court his complaint for divorce in which he charged the defendant, Monica Abrams, with having committed adultery on August 19, 1947, and at other times with one John Doe. On June 22, 1948, the complaint was amended by striking out the name "John Doe" and inserting in lieu thereof "Lawson Green." On September 15, 1948, the complaint was again amended by charging that on May 8, 1948, the defendant also committed adultery with a person whose name was unknown to plaintiff, that on July 20, 1948, the defendant committed adultery with Glen Burgett, and on July 18, 1948, committed adultery with one James Gaines.

The defendant's answer denied all charges of adultery.

The defendant's counter-claim for divorce, filed May 18, 1948, charged the plaintiff with extreme and repeated cruelty on six specific dates and on other occasions.

Nelson

February Term, A.D. 1950

General No. 9805

MELVIN L. MORAVS,

Plaintiff-Appellant,

-vs-

NORICA MORAVS,

Defendant-Appellee.

DAVY, J.

On May 8, 1948, the plaintiff, Melvin L. Moravs, filed in the Circuit Court his complaint for divorce in which he charged the defendant, Norica Moravs, with having committed adultery on August 19, 1947, and at other times with one John Doe. On June 20, 1948, the complaint was amended by striking out the name "John Doe" and inserting in lieu thereof "Lawson Green." On September 18, 1948, the complaint was again amended by charging that on May 8, 1948, the defendant also committed adultery with a person whose name was unknown to plaintiff, that on July 20, 1948, the defendant committed adultery with Glen Burgett, and on July 18, 1948, committed adultery with one James Gaines.

The defendant's answer denied all charges of adultery.

The defendant's counter-claim for divorce, filed May 18, 1948, charged the plaintiff with extreme and repeated cruelty on six specific dates and on other occasions.

The plaintiff's answer denied all charges of cruelty, except it admitted that on one occasion he justifiably struck her, and alleged that on other occasions when he used violence he was merely using such force as was necessary to defend himself

After hearing the case without a jury, the court entered a decree on December 9, 1948, which found that the plaintiff had not proved his charges of adultery, and found the plaintiff, counter-defendant, guilty of extreme and repeated cruelty as charged in the cross complaint. The decree adjudged the plaintiff, counter-defendant guilty of extreme and repeated cruelty as charged, and awarded the defendant-cross-plaintiff a decree of divorce, and $50 per month alimony.

Plaintiff brings this appeal. The only question is whether the evidence justified the decree appealed from.

We believe it would unduly extend this opinion and serve no useful purpose for us to attempt to make any detailed or extensive statement of the voluminous testimony.

The plaintiff has resided in Havana, Illinois, for about six years. He is a dentist and has practiced his profession in Havana during his residence there. He served in the United States Army during World War II as a captain. In 1944, while stationed at Kum, Iran, he met the defendant. From her testimony it appears that she is of French descent, was born in Lithuania, and was raised in Poland, had been a major in the Polish army from 1941 to the summer of 1943, worked one year for the British Intelligence, was employed as a translator by the American mission to Iran for about six months, had been in a Russian concentration camp for two years, and worked as a supervisor in a laundry at Kum. She speaks English

counter-defendant

imperfectly and with some difficulty. They were married at Iran on May 16, 1945. Thereafter they returned to the United States and after his discharge from the army, plaintiff re-established his residence at Havana and re-opened his dental office in such city. One child, a girl, was born of such marriage in May, 1946.

According to plaintiff's brief, "Defendant exhibited extreme jealousy toward plaintiff's women patients and office assistants. They had violent quarrels and on several occasions defendant assaulted plaintiff, using a meat axe on one occasion, a shot gun on another, grabbed plaintiff by the testicles, invaded his office and threw an ink bottle at plaintiff. Plaintiff admits on these occasions he struck defendant in self-defense. Defendant, without corroboration, testified as to other acts of cruelty which are denied by plaintiff. On April 22, 1948, the parties separated permanently."

They lived separate and apart for a time in October, 1947, for three weeks in November, 1947, and, according to plaintiff's testimony, on many other occasions. Their final separation was on April 22, 1948.

Proof as to alleged adultery with Lawson Green may properly be said to have depended entirely on the testimony of Mary Green, who was a sister-in-law of Lawson Green and who lived in the country near Havana. Such testimony was at least as consistent with the innocence of defendant as with her guilt on the charge of adultery, and we believe the trial court was justified in believing that such testimony was not sufficient proof of adultery. In fact, Mary Green testified she had made a statement to defendant's counsel that the thought of adultery had never entered her mind on the occasion in question.

occasion in question.

Proof as to alleged adultery with Burcett and Gaines depend entirely on the testimony of Warren Henry, Rosemary Doyle, who was Henry's former wife and from whom he was later apparently divorced, and Betty Doyle, a sister of Rosemary. The record is not very clear, but apparently during two or three weeks in July, 1948, the three of them stayed at the Abrams home where the defendant was then living, Henry doing some odd jobs about the house, and his wife and her sister doing or helping with the house work, for their rooms and board. Apparently none of them knew defendant before living at the Abrams home. They testified to seeing no act of intercourse, but did testify to facts which, if true, might indicate sexual intercourse in the Abrams home between the defendant and Burcett, and perhaps with Gaines. Their testimony shows that during the time they were in such home, during the day and during the night, all inner doors of the house were at all times unlocked, and they could and did freely go from one room to another, including bedrooms. We consider it sufficient to say that in our opinion their testimony was so inherently improbable that the trial judge was justified in not believing their testimony and in disregarding the same.

There was no proof of adultery with any "unknown person," as alleged in the complaint.

The defendant testified that since her marriage to plaintiff she had not had sexual intercourse with any one other than plaintiff.

In Hoof v. Hoof, 395 Ill. 170, 174, the court said: "It being important to the well-being of society that the marriage relation should not be severed, where a divorce is sought from a wife for adultery the proof to warrant a decree must clearly convince the mind affirmatively that actual adultery was committed, as nothing short of the carnal act can lay the foundation for such divorce."

The defendant testified that on August 22, 1947, she was told by some one that her husband was going to bring another woman into the home on a certain night, that she then concealed herself in a closet and about 12:20 a.m. the plaintiff brought such other woman into the house, that the defendant remained concealed for sometime and then came out and found the plaintiff and such other woman partly dressed, and that the plaintiff then struck the defendant. In his testimony the ~~defendant~~ plaintiff admitted that on such occasion he brought such woman to his home, but stated that he and the woman had gotten only about five feet into the house when they were confronted by the defendant with a shotgun, that he then took the shotgun away from the defendant and the other woman ran out of the house. He testified that he had previously seen such other woman around town, but on the day in question met and took her to dinner in a hotel in Springfield, and then brought her back to Havana and took her to his home to have a drink. He denied that on such occasion he was in a state of undress.

The defendant testified to many other specific acts of extreme cruelty on the part of the plaintiff, stating that the last of such acts occurred in July, 1948, when she testified he twisted and broke her arm. Her testimony as to injuries she received on other occasions was corroborated by the testimony of physicians. The plaintiff denied some of such alleged acts of cruelty, and as to others testified that he was acting in self defense.

The questions of whether or not the defendant was guilty of adultery, and whether or not the plaintiff was guilty of extreme and repeated cruelty, as charged, were, of course, questions of fact.

fact.

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manifestly, and whether or not the plaintiff was guilty of extreme

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he was in a state of drunkenness.

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in a hotel in Springfield, and then brought her back to Jamaica and

around town, but on the day in question met and took her to dinner

spending many days from the defendant and the other woman ran out of the

confronted by the defendant with a statement, that he then took to a

that action only about five feet into the house when they were

brought suit upon the ground of cruelty and desertion. She testified that he had previously been much other woman

In his testimony the defendant admitted that on such occasion he

partly dressed, and that the plaintiff then struck the defendant,

and then came out and found the plaintiff and such other woman

into the house, that the defendant remained concealed for awhile

and about 10:30 p.m. the plaintiff brought such other woman

the home on a certain night, that she then concealed herself in a

by some one that her husband was going to bring another woman into

The defendant testified that on August 28, 1917, she was told

The law is well settled that where the evidence is conflicting the finding of the chancellor will not be disturbed unless it is clearly against the preponderance of the evidence. The chancellor saw the witnesses and heard them testify and was in a much better position to determine their credibility than we are. A court of review will not disturb the findings of fact of the chancellor under such circumstances unless it is apparent that error has been committed. (Arliskas v. Arliskas, 345 Ill. 112.) In our opinion the evidence justified the decree appealed from.

The question of the custody of the child is not involved in this appeal.

Such decree is affirmed.

Affirmed.

44941

JAMES CAREVIC, a minor, by Victor Carevic, his father and next friend, Appellant,

v.

ASHLAND PUBLIC MARKET, INC., a corporation, and WILLIAM KOPEC, Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Plaintiff, six years of age, was struck by a truck backing up at a curb. The jury found the defendants not guilty, judgment was entered on the verdict, and from that judgment, plaintiff appeals. The only point in the case is whether the verdict is against the manifest weight of the evidence.

There is a conflict in the testimony not only between witnesses for the plaintiff and those for the defendants, but among the plaintiff's own witnesses as well. One witness for the plaintiff, Theresa Putz, testified that the plaintiff and another boy of the same age were hanging on the back of the truck when the driver came out of a priest's home located at a nearby school and church, got into the truck and started to back it; that the two children at that point left the back end of the truck and in doing so, plaintiff tripped and fell at the curb and the truck ran over his body. Other witnesses, however, testified that both boys were on the

curb and walked out into the street when the truck backed up. Both of the boys testified that they were walking across the street when the truck struck the plaintiff. The truck driver's story, supported by the testimony of his helper, is to the effect that the truck was facing north at the east curb of the street; that he looked to see if there were any boys on the truck and saw none; that he got into the driver's seat and for a minute or two checked off his list of orders; that after checking the list, he looked through the window at the rear of the cab, opened the door on the left side and put his head out; that he did not see either the plaintiff or the other child; that as there was no room to proceed directly into the street on account of the proximity of an automobile in front of him, he proceeded to back up and then struck the plaintiff. The accident occurred in the middle of the block and not at a crossing or intersection.

Certain elementary principles need restatement here. The finding of a jury will be disturbed only where it is manifestly against the weight of the evidence. We see no point in adding further to the many definitions of "manifest." That it is a word of emphasis and designed to restrain interference with the jury's verdict is manifest. It has always been stated that if the testimony of either side standing alone would support a verdict, it

should not be set aside unless the verdict is contrary to the manifest weight of the evidence. Sulzberger v. Sulzberger, 372 Ill. 240. The trial was conducted fairly. It is a matter of common knowledge that with a jury as with all others who have to do with the trial of these matters, the unfortunate injury of a child appears greatly to the sympathies of the triers of fact. The jury must have been strongly convinced that the driver's story, revealing care and caution, was true. Plaintiff cites a number of cases in which this court has imposed upon the driver of a car on a street in which children are playing or likely to play a duty to observe such care and caution as will enable him to guard against sudden, impulsive and playful movements of children in the street. No such question is involved in this case.

Judgment affirmed.

Scanlan and Friend, JJ., concur.

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44743

CHICAGO BLOWER CORPORATION, a corporation, Appellant, v. RONAN CORPORATION, a corporation, and DEVON-NORTH TOWN STATE BANK, a corporation, Appellees.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

340 I.A. 218

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the Ronan corporation to recover $2700 given as a deposit by plaintiff for the rental of the premises owned by the Ronan corporation. Defendant answered and plaintiff filed a reply pleading the Statute of Frauds. On defendant's motion the reply was stricken. Trial before the court without a jury resulted in a finding in favor of the defendant Ronan Corporation and Devon-North Town State Bank, and judgment was entered accordingly. Plaintiff appeals. In its brief plaintiff raises no issues as to defendant Devon-North Town State Bank.

Early in 1947 plaintiff, a manufacturer of fans and blowers for industrial purposes, was seeking quarters in which to manufacture its product. Defendant was the owner of a three-story building located at 2441 South Michigan Avenue in the City of Chicago and occupied the first and second stories of these premises. The third floor was leased by defendant to a tenant from month to month. On Friday, March 14, 1947, Fred Gohl, president of plaintiff corporation, accompanied by his shop superintendent Eric Johnson, went to

defendant's premises for the purpose of negotiating a five-year lease of the third floor. Members of the Gordon family owned the stock of defendant corporation. On this occasion Gohl and Johnson were shown the first and second floors of the building by Robert Gordon but did not gain access to the third floor. All the floors of defendant's premises were of substantially the same dimensions and construction. On the following Sunday, March 16, 1947, the parties met again and Richard Gordon carried on the negotiations for the leasing of the premises in question. He conducted Gohl to the third floor of the building, whereupon Gohl examined these premises. At this meeting, according to Richard Gordon, they discussed "the heating problem" and the "building in its component parts" as well as the nature of the defendant's business. On the same day, March 16, Gohl gave Richard Gordon a check dated the following day, which reads as follows:

2-127 DEVON NORTH TOWN STATE BANK 2-127
Chicago, Ill. March 17, 1947 No. 203
Pay to the
order of Ronan Corp. $2700.00
Twenty Seven Hundred Dollars $\frac{00}{100}$ Dollars

CHICAGO BLOWER CORP.
F. H. Gohl

On the back of the check in the handwriting of Gohl appears the following:

"Deposit on last 6 months of lease at $450 per month to run from May 1, 1947 to May 1, 1952, 3rd floor at 2441 South Michigan Ave."

Shortly thereafter defendant cashed the check and retained the proceeds.

It is uncontroverted that the district in which defendant's building is situated is zoned for commercial use.

Plaintiff contends that defendant represented the district as being zoned for manufacturing purposes and that defendant agreed to withhold cashing the check until plaintiff had made an examination of the zoning ordinances in order to ascertain whether the zoning ordinances of the City of Chicago permitted the operation of its business in the premises.

Richard Gordon testified that he discussed the zoning with Gohl at their meeting on March 16 and told him that "our building and the general area was zoned for commercial purposes"; that Gohl replied he was familiar with the zoning and also knew "of a number of manufacturing firms in the general vicinity." The witness denied that there was any conversation about the check being dated March 17 instead of the 16th in order to give defendant time to "check the zoning laws."

Richard Gordon further testified that about three weeks after the delivery of the check Gohl told the witness that "they were not going to take the premises as they found better premises for less money." Gohl testified that several days after March 17 he informed Richard Gordon that plaintiff would not lease the premises "because of the zoning," and asked him to return the check; and that two weeks later the witness again demanded that Richard Gordon return the check. The versions of Gohl and Gordon with respect to their discussions about zoning and withholding the check are in sharp

conflict. We think the trial judge was warranted in finding that no misrepresentation was made by defendant to plaintiff that the premises here involved were zoned for manufacturing purposes and that there were no conditions attached to the delivery of the check.

Plaintiff maintains that the trial court erred in striking the reply on the ground that the check was a good and sufficient memorandum of the lease as required by the statute of frauds. Defendant insists that the cause was tried on the theory that it had entered into an agreement to make a lease and that it had performed its agreement. It is undisputed that immediately after receiving plaintiff's check defendant notified the tenant occupying the premises to vacate and that several weeks thereafter the tenant in possession did vacate in order to give possession to plaintiff. In the meantime, according to defendant's testimony, plaintiff decided not to take defendant's premises because it had found "better premises" elsewhere for a lower rental.

In the oral argument before this court plaintiff denied that a lease had been proffered to it by defendant in accordance with agreement but in our view this is immaterial since under the circumstances here shown tender of a lease would have been a futile act. After plaintiff had declared its intention to abandon the premises in question nothing remained to be done by defendant. And, since the contract had been fully and completely performed on the part of defendant, plaintiff is estopped from relying on the statute

of frauds. (Knight v. Collings, 227 Ill. 348; Spalding v. White, 184 Ill. App. 217; Mead v. Chicago and North Western Ry. Co., 189 Ill. App. 323.) After defendant had been informed by plaintiff that it was not going to take the premises they were listed with real estate brokers and advertised in the daily newspapers. Defendant procured another tenant who leased the premises for a period of three years commencing January 1, 1948 at a monthly rental of $350, thus sustaining a loss, as a result of plaintiff's failure to take possession, in excess of the sum plaintiff seeks to recover in the instant proceeding.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE AND KILEY, JJ. CONCUR.

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44880

JOHN SEBASTIAN, Appellee, v. HERMAN STAMER and JULIUS STAMER, Appellants.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

340 I.A. 218

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint alleging that defendants conspired to deprive him of his interest as a major stockholder in a corporation and converted the corporate funds to their own use. Defendants answered and the cause was referred to a master in chancery. In substantial conformity with the findings and recommendations of the master's report a decree was entered. Defendants appeal.

April 10, 1946 plaintiff and defendants executed proposed articles of incorporation of the Delhi Manufacturing Company at the suggestion of defendant Herman Stamer. A certificate of incorporation was issued by the Secretary of State of the State of Illinois on April 16, 1946 and afterward was recorded in the office of the Recorder of Deeds in Cook County, Illinois. Shortly after the incorporation of the Delhi company plaintiff delivered to defendant Julius Stamer a cashier's check payable to plaintiff's order in the sum of $2500, and also delivered to him certain patterns for hassocks. On April 22, 1946 the check was deposited to the account of Peg-Car Universal Corporation, hereinafter called Peg-Car. Herman Stamer was president of Peg-Car.

June 1, 1946 an agreement entitled "Articles Creating Credit and Service Agency between Peg-Car Universal Corporation and Delhi Manufacturing Company" was prepared by defendants' lawyers. The agreement provided, among other things, that plaintiff and defendants deposit with the Delhi company the sum of $7,000 in order to establish credit for the benefit of Delhi company and to secure the services of Peg-Car in the purchase of all its materials and the sale of its products for a period of fifteen years; that all the contracts of purchase and sale shall be executed in the name of Delhi company, and that Peg-Car shall make the purchase and sale or guarantee payment of the purchase price, for which it shall receive a commission of five per cent of the gross sales or gross purchases; that plaintiff and defendants were to cause ten per cent of the capital stock of Delhi company to be conveyed to Peg-Car and, in consideration thereof, Peg-Car was to supply Delhi company with a line of credit in the sum of $7,000. On the same day the foregoing agreement was executed by defendant Herman Stamer and Peg-Car. Some time after August 5, 1946 defendant Julius Stamer signed the agreement. Plaintiff objected to some of the provisions of the agreement and never executed it.

June 18, 1946 plaintiff and defendants were elected directors of Delhi corporation and plaintiff was elected president. Herman Stamer was elected secretary and Julius Stamer was elected vice president and treasurer. June 26, 1946 a stock certificate representing thirty-seven shares of common stock of Delhi company with a par value of $100 each was issued in the name of plaintiff and signed by him as president and by defendant Herman Stamer as secretary.

In June or July 1946 Delhi company commenced the manufacture of hassocks in the factory of Peg-Car and paid Peg-Car monthly rental for the use of its premises.

October 24, 1946, at a special meeting of the board of directors of Delhi company, plaintiff was removed as president and his stock certificate was canceled. At the hearing before the master defendants argued that the stock certificate was issued to plaintiff upon the express condition that he sign the agreement entitled "Articles Creating Credit and Service Agency." Plaintiff insists that the stock certificate was issued to him in consideration of the payment of $2,500 and the patterns for hassocks. The decree found that there was never "any meeting of the minds between plaintiff and the defendants," and that, since defendants accepted the money and patterns under a mistaken impression as to the purpose for which payment was made to them, they are holding the money and patterns as constructive trustees for the plaintiff and that plaintiff is entitled to the return of the sum of $2,500 and the hassock patterns. The decree denied plaintiff's prayer for an accounting and certain wages claimed by the plaintiff, and dismissed the suit as to Peg-Car and Delhi company.

Defendants contend that the proof does not support the allegations of the complaint and does not warrant the relief granted in the decree. Since the complaint contained a prayer for general relief the relief granted need not be limited to the special prayer of the complaint. (Village of Winnetka v. Chicago and Milwaukee Electric Ry. Co., 204 Ill. 297.) A general prayer for relief is sufficient to support

any decree warranted by the facts alleged in the bill and established by the evidence. (Geiger v. Merle, 360 Ill. 497.)

The gist of the complaint is that defendants fraudulently exploited the Delhi company and converted its funds and assets to their own use, and that in furtherance of their conspiracy of fraudulently exploiting the Delhi company and converting its assets to their own use they removed plaintiff as president of Delhi company in order to conceal their wrongful acts from plaintiff. Defendants assert that plaintiff knew that his $2,500 check was paid to Peg-Car in order to obtain its services as agent to purchase supplies and sell hassocks and that plaintiff's money did not pay for stock in the Delhi company. Plaintiff testified that he told Julius Stamer to deposit the check in the name of the Delhi company to pay for stock. The stock certificate representing thirty-seven shares in the Delhi company was prepared by defendants' lawyer, signed by the defendant Herman Stamer, and delivered to plaintiff. Whether the delivery of plaintiff's check and hassock patterns to defendants was intended as payment for the stock in the Delhi company or to obtain the services of Peg-Car presented a question of fact which was resolved by the chancellor adversely to defendants. It is uncontroverted that the hassocks made by the Delhi company were sold in the name of Peg-Car and the proceeds of the sales placed in the Peg-Car account; that Peg-Car advertised Delhi hassocks as a product of Peg-Car; that all of the machinery used in the manufacture of hassocks was purchased in the name of Peg-Car; that all capital funds of Delhi were deposited in the account of Peg-Car; and that the corporate funds of Peg-Car and Delhi Company were commingled.

Plaintiff testified that he made twenty demands on Peg-Car for an accounting and that his demands were refused, and that defendants also refused to permit plaintiff to examine the books and records of Delhi company.

There is no doubt that plaintiff believed he was making an investment in the Delhi company when he delivered his check and patterns to defendants and that the stock certificate of thirty-seven shares represented his interest in the Delhi company.

A court of equity would be of little value if it could suppress only positive fraud and leave mutual mistakes innocently made to work intolerable mischief contrary to the intention of the parties. (Darst v. Lang, 367 Ill. 119.)

Any transaction may be the basis for creating a constructive trust where for any reason the defendants hold funds which in equity and good conscience should be possessed by the plaintiff. (People ex rel. Nelson v. Central Mfg. Dist. Bank, 306 Ill. App. 15; Reid Murdoch & Co. v. Sheffy, 99 Ill. App. 189.)

For the reasons stated, the decree is affirmed.

DECREE AFFIRMED.

BURKE AND KILEY, JJ. CONCUR.

45073

DAISY F. BUCKWALTER,

Appellee,

v.

CLARENCE J. BUCKWALTER and METROPOLITAN TRUST COMPANY, an Illinois Corporation, as Trustee under Trust #2217,

Defendants,

On Appeal of METROPOLITAN TRUST COMPANY, an Illinois Corporation, as Trustee under Trust #2217,

Appellant.

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT,

COOK COUNTY.

340 I.A. 219

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant Metropolitan Trust Company, as trustee, appeals from an order denying its motion to vacate an interlocutory order for the issuance of an injunction without notice and bond in an action for separate maintenance instituted by plaintiff against her husband, a nonresident.

The complaint filed September 8, 1949 alleges in substance that plaintiff and defendant Clarence J. Buckwalter were married January 18, 1909 and thereafter lived together as husband and wife until 1930; that on May 22, 1922 they adopted a girl aged five; that since 1931 defendant Buckwalter, without provocation, absented himself from plaintiff without fault on her part and that he has refused to provide for the maintenance of plaintiff and their adopted daughter. The complaint further alleges that in May 1949 defendant Buckwalter inherited the entire estate of his brother Frank Buckwalter in Sioux City, Iowa, valued at more than

$500,000; and that plaintiff is informed and believes that defendant owns the beneficial interest in a two-flat building in the City of Chicago, legal title to which is in the name of the defendant trust company as trustee. The complaint concludes with a prayer for an injunction to restrain the trust company as trustee from transferring the title to the real estate described in the complaint or the beneficial interest of the plaintiff therein, and for general relief.

Defendant trust company contends that the chancellor erred in entering the order for an injunction without notice and without bond. Chapter 69 Ill. Rev. Stats. 1949, State Bar Asso. Ed. on injunctions, section 3, requires previous notice of the time and place of the application for an injunction unless it shall appear from the complaint that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued without notice. There is no allegation in the complaint that plaintiff's interests would be prejudiced, nor facts alleged from which prejudice could be inferred, if the injunction were not issued without notice. And section 9 of the same chapter requires plaintiff's bond unless good cause is shown for waiving it. The order here in controversy does not contain a finding of "good cause shown." Moreover, a finding of good cause shown rests on the complaint which must allege sufficient facts justifying that finding and excusing the notice and bond. (Drewry's Ltd. U.S.A., Inc., a corp. v. Drewry's Beers, Inc., 316 Ill. App. 307, 44 N. E. (2d) 454.

The precise questions here presented were determined in Schneider v. Schneider, 312 Ill. App. 59, upon which plaintiff relies. In that case the plaintiff averred that her husband threatened that he would sell, transfer, encumber, and assign all of his stocks and bonds and would also withdraw any and all moneys which he had on deposit in various banks so that it would be beyond the reach of the jurisdiction of the court; that she believed the defendant, her husband, would carry out his threat to her detriment and irreparable injury; and that plaintiff was without means to provide for a bond for the issuance of an injunction. These allegations distinguish that case from the case at bar.

In the instant case we find no allegations in the complaint excusing the requirement of notice and bond before the issuance of an injunction. (Sonney Amusement Enterprises, Inc., v. Astor Entertainment Co., Inc., #45026 Ill. App.) The injunction therefore was improvidently issued.

For the reasons given, the order appealed from is reversed.

ORDER REVERSED.

BURKE AND KILEY, JJ. CONCUR.

1534

44263

EVELYN ALTSCHULER, Executrix of the Last Will and Testament of Samuel Altschuler, Deceased, et al., Plaintiffs - Appellees, v. IRWIN I. ALTSCHULER, Defendant - Appellant.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY.

340 I.A. 230

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Irwin I. Altschuler, from the decree entered on August 25, 1947, by the Superior Court of Cook County, and from an order entered on September 12, 1947, taxing master's fees. We dismissed the appeal on the ground that the decree was not final. In an opinion filed on March 18, 1948, (399 Ill. 559) the Supreme Court said: "In accordance with our views the order dismissing the appeal is reversed and the cause remanded to the Appellate Court, with directions to consider the above questions as well as all other questions determined by the superior court of Cook County properly presented in the cause." It is unnecessary to repeat the statement of the case made in the Supreme Court opinion.

We agree with defendant that the order entered by the Probate Court on October 7, 1931, in the Matter of the Estate of Isaac Altschuler, Deceased, approving the final report of defendant and discharging him as administrator, was a valid judgment, that it was binding upon the plaintiff's testate as a party to the entry of that order and bars the reimposition upon the defendant through a collateral attack

upon that judgment of a liability to account for all acts and doings as administrator of the estate of Isaac Altschuler, deceased. The order of the Probate Court approving the final report and account and discharging the administrator was not the result of fraud, accident or mistake. Plaintiff, as legal representative of her testate, is barred from obtaining in a collateral proceeding as the instant case an accounting de novo by the administrator. There was no direct appeal from the order of the Probate Court. Ill. Rev. Stats. 1931, Ch. 3, Sec. 114; Lewis v. West Side Trust & Savings Bank, 376 Ill. 23, 45; Hulburd v. Commissioners of Internal Revenue, 296 U. S. 300, 311-314, 80 L. ed. 300, 349-350; cf. Matter of Estate of Togneri, 296 Ill. App. 33, 37. The chancellor erred in ordering the defendant to make an accounting of and concerning his acts and doings as Administrator of the Estate of Isaac Altschuler, Deceased.

We find that the partnership agreement dated December 31, 1936, between the defendant and Samuel Altschuler is an authentic and binding contract, the provisions of which operated to release and discharge defendant and to terminate any liability then owing on his part to plaintiff's testate in relation to the business known as the Altschuler Iron & Steel Company, either as a supposed trustee or agent under the written appointment, or as copartner in the family partnership. The partnership agreement was an integral part of a transaction which comprehended the cessation of the association of Ida Altschuler and Sarah Altschuler Steinberg, as co-owners in the carrying on of the business and the continu-

ation of that business by a partnership composed of Irwin and Samuel Altschuler alone. The finding to the contrary by the master is against the manifest weight of the evidence. There is support for the master's finding that "at least during 1937 all the members of the family partnership gave no effect to the partnership agreement." The issue, however, is not when the partnership agreement became effective, but whether it is an authentic and binding instrument. In the instrument the parties agreed that Irwin Altschuler had contributed to the partnership two-thirds of all the assets "which it now has or owns" and that Samuel Altschuler "has contributed one third thereof." The "assets which it now has or owns" were property and assets of the old business. By their agreement of December 31, 1936, Irwin and Samuel Altschuler accounted for and fully settled between them their respective interests in and claims to the old business known as the Altschuler Iron & Steel Company, its assets and property, which as partners of the new partnership they were continuing. By their final settlement each was released and discharged and his liability terminated with respect to the old business, its property and assets. Such release is binding on any person in privity, as the plaintiff. The chancellor therefore erred in directing the defendant to make an accounting of the affairs and business from October 7, 1931, until the formation of the new partnership.

Plaintiff asserts that the evidence conclusively shows that there was some kind of a settlement between defendant and Samuel Altschuler in the spring of 1938, and that up to the time of his death Samuel Altschuler never

received full payment and satisfaction of the amount due him on such settlement. Defendant insists that there was no 1938 settlement and that Samuel Altschuler was not the owner of the funds deposited in the joint account at the First National Bank when that account was opened. Plaintiff maintains that the entire account in the First National Bank, because of a resulting trust, was equitably invested in Samuel. There is no support for plaintiff's position that there was a 1938 settlement. We find that the evidence clearly establishes that the joint account during the lifetime of Samuel Altschuler was an asset of the partnership. Since the stocks were joint account property, the defendant was authorized to dispose of them and deposit the proceeds in the joint account without being guilty of misconduct. Perkins v. Brown, 300 Ill. 490, 497.

In the partnership agreement it was provided that the net profits of the business were to be divided in the proportion of two thirds to Irwin Altschuler and one third to Samuel Altschuler and that the losses of the business not met out of partnership assets were to be sustained by the parties in the same proportion. Par. 11 provided:

"In the event that either of the parties hereto shall desire to withdraw from said copartnership or, in the event of the death of either copartner, the remaining party shall have the option of purchasing the interest of such withdrawing or deceased party. In either of these events, an account shall be taken of all of the copartnership property and provision made for payment of all just debts and liabilities of the copartnership. Subject to such provision, the remaining or surviving copartner shall pay the amount determined to be due to the withdrawing partner, or the

heirs, executors or representatives of such deceased co-partner, in the same proportions as hereinbefore set forth, to-wit: To the first party [Irwin I. Altschuler] or his heirs, executors or assigns a sum equal to two thirds, (2/3rds) of the remaining net assets, and to the second party [Samuel Altschuler] or his heirs, executors or assigns, a sum equal to one third (1/3rd) of the remaining net assets."

On February 10, 1945, Samuel Altschuler died. On April 12, 1945, his will was admitted to probate and his widow qualified as executrix thereunder. Meanwhile, defendant employed a firm of public accountants to prepare an audit of the books and records of the business known as the Altschuler Iron & Steel Company beginning with January 1, 1937, and to cover transactions of the joint account beginning with the opening of that account with the First National Bank of Chicago on May 4, 1938. On November 2, 1945, the accountants completed their work and furnished the defendant with their audit. The audit was in the form of a statement of account between Irwin and Samuel Altschuler as of February 10, 1945. It contained a computation of the amount of Samuel Altschuler's interest or claim on that date by reason of transactions in the joint account, and a computation of Samuel Altschuler's interest on that date in the business known as the Altschuler Iron & Steel Company, apart from the transactions in the joint account. In making these computations the accountants assumed (a) that the fact that Samuel Altschuler predeceased Irwin did not terminate his (Samuel Altschuler's) interest in the personalty of the joint account, whatever its converted form at the time of his death, (b) that personalty of the joint account was a partnership asset owned by Irwin and Samuel Altschuler as co-partners and subject, as such, to the provisions of the partnership agreement with respect to percentage of ownership interests

of the partners, and (c) that the real estate used in the operation of the business also was a partnership asset and governed, as such, by the terms of the partnership agreement. Accordingly they determined, and in their statement of account set forth, that the value or amount of the interest or claim to which the executrix of Samuel Altschuler's estate succeeded by reason of the transactions in the joint account was $81,602.56, and the value or amount of the interest or claim to which she succeeded by virtue of her testate's share in the partnership property of the business, apart from the personalty of the joint account, was $8,974.77, or an aggregate interest of $90,577.33. On November 3, 1945, defendant tendered to plaintiff, as executrix, the sum of $90,577.33, by cashier's check, in exercise of the option provided by the agreement of December 31, 1936. At the same time he furnished her with the statement of account prepared by the accountants. She refused to accept the tender. She said that she wished to consult with her attorneys about the matter and that the check was not big enough. She never accepted the offer. Since the death of Samuel Altschuler, the defendant has continued in operation the business known as the Altschuler Iron & Steel Company. The business was a "war casualty". At the time of Samuel Altschuler's death its net worth, apart from the joint account, was $19,548.56.

The chancellor found that the defendant, as the surviving partner of the partnership dissolved by the death of Samuel Altschuler, failed in a duty to the plaintiff, as legal representative of the deceased partner, to make an accounting

of the partnership, its affairs and property; also that the defendant failed in a duty to such legal representative to make an accounting of the personalty of the joint account begun with the First National Bank of Chicago on May 4, 1948. The chancellor ordered defendant to make an accounting "as such fiduciary" of and concerning the business, affairs and property of the dissolved partnership during the period of the partnership until the death of Samuel Altschuler and thereafter to the date of making of the account, and to make a separate accounting of and concerning the personalty of the joint account. The chancellor decreed that defendant acquired nothing by his tender and decreed, by affirmance of the master's findings, that the personalty of the joint account and the realty used in the operation of the partnership business were not assets of the dissolved partnership, and that such realty now belonged to the plaintiff as devisee under her testate's will and the defendant as tenants in common. The orders in the decree, hereinabove mentioned, resulted from the refusal of the chancellor to give legal effect to the tender made on November 3, 1945. Defendant maintains that the tender of November 3, 1945 was effective and binding upon plaintiff, as legal representative of the deceased partner, and that none of the objections raised by her to the amount tendered is valid. Plaintiff argues that defendant was not exonerated from his duty as surviving partner from rendering a full, complete and accurate accounting of the affairs and property of the dissolved partnership or of the joint account in the name of Samuel Altschuler and

defendant, or concerning "the $127,118.90, or from an accounting with reference to the $214,048.90 which defendant in his own handwriting admitted he owed Samuel Altschuler under a settlement made in 1938." We have held that there was no 1938 settlement as claimed by plaintiff. Plaintiff complains that the settlement of account given her when the tender was made is intricate, complicated and unintelligible. We cannot agree with this characterization. The statement was prepared in accounting form by a reputable accounting firm. It is divided into two parts, the first consisting of a summary of transactions in the joint account and indicating Samuel Altschuler's interest by reason of such transactions, and the second consisting of a balance sheet of the partnership business at death, apart from the joint account, and indicating Samuel Altschuler's interest by reason of such partnership business. The statement does not purport to and does not give underlying data, but is, as therein stated, a summary and a balance sheet. Such data was readily available to plaintiff. Her position from the outset has not been that she wanted more data, but that she wanted more money.

Plaintiff states that the option granted by the partnership agreement does not provide who shall take the account of partnership property at death, and argues that the surviving partner has no absolute right to name the purchase price. Under the option agreement the surviving partner is privileged to take the account of partnership property in the first instance. When he has ascertained that price and makes the tender, the legal representative

then can accept or reject it. If the legal representative rejects the tender, an issue is formed as to whether the amount tendered was in substantial performance of the purchase contract. If this issue enters litigation, the matter before the court is, not the stating of an account as in an accounting case, but whether the rejection of the tender was proper on the grounds asserted. Plaintiff states that the statement of account and tender wrongfully omitted a Cadillac automobile and a Chevrolet automobile belonging to the partnership. This property did not belong to the partnership at the time of Samuel Altschuler's death.

Plaintiff asserts that the purported statement of account improperly included the moneys in the joint account in the First National Bank of Chicago and proceeds of stocks registered in Samuel Altschuler's name, which defendant fraudulently obtained by simulating Samuel Altschuler's signature on transfer forms on certificates of stock and on checks of Clement Curtis & Co., payable to Samuel Altschuler. The initial deposit of $203,531.25 in the account represented the proceeds from securities owned by Irwin and Samuel Altschuler as copartners. At no time during the six years from the opening of the joint account until the death of Samuel Altschuler except in one instance, was any of the personalty representing this deposit and the increment thereof distributed to either Irwin or Samuel Altschuler as and for his sole property. The exception was the purchase of $6,000.00 of war bonds, which were distributed in the proportion of two thirds to Irwin Altschuler and one third to Samuel Altschuler, the same ratio

provided in the partnership agreement as to capital ownership. The personalty of the joint account continued to be until Samuel Altschuler's death undistributed assets of the partners, and under the usual trust principles the partners retained their proportionate interest in such property whatever its form from time to time, whether as a chose in action against the bank for deposited funds, or against an individual partner for borrowed funds, or as shares of capital stock, or as bonds, and howsoever title or possession to such property was held, whether in joint tenancy, or registered in the name of Samuel Altschuler, or in the personal vault of Irwin Altschuler. The certificates evidencing the 1,000 shares of United States Steel Corporation, 300 shares of Continental Illinois Bank & Trust Company, 1,000 shares of Middle West Corporation and 500 shares of the Glen L. Martin Company, although purchased through the Samuel Altschuler brokerage account and taken in his name, at no time during the six year period of the existence of the joint account were made available, in whole or in part, to either partner for his own use. On the one hand, the certificates were registered in Samuel Altschuler's name; on the other, they were kept in the personal safety deposit vault of Irwin Altschuler, to which Samuel Altschuler had no access. This was true even though both partners had other securities which they held and retained personally. The bonds purchased with joint account funds also were kept in the vault. The securities were kept in envelopes marked, "Contents of these envelopes the property of Irwin I. and Sam Altschuler, joint account." All dividends

received on these shares of stock and proceeds from the sales of the bonds, including profits thereon, were deposited in the joint account at the First National Bank and were not distributed. Drawings by the partners from the funds of the joint account for personal purposes were not treated as distributions of assets to them, but as loans and charges against them to be accounted for as choses in action of the joint account. Both partners maintained throughout the period of the joint account consistent observation over the status of the joint account as a continuing asset. At the end of each month they reconciled bank statements from the First National Bank with cancelled checks and bank memoranda. That legal title to personalty of the joint account was held in joint tenancy or in the name of Samuel Altschuler would not affect the ownership or proportionate interest of Irwin and Samuel Altschuler in such property as undistributed partnership assets. Where property is acquired in joint tenancy or in common, and the contributions thereto are unequal, "it has been held that the contributors are entitled to the beneficial interest proportionately to their contributions, in the absence of evidence to the contrary. The grantees, accordingly, hold the legal title as joint tenants or tenants in common, but there is a resulting trust in favor of each in proportion to his contribution." (Scott on Trusts, Vol. III, sec. 454.6, pp. 2293-2294.) "A resulting trust arises if it is shown that the purchase price was in fact paid by one person and the title taken in another, * * * even though the deed states that the conveyance is made to the use of the grantee." (Ibid.,

sec. 440, pp. 2239-2240.) This rule is applicable to personal property as well as realty. (Ibid., sec. 440, p. 2240.) In People v. Sholem, 244 Ill. 502, the court said (508):

"There was a large amount of real estate standing in the name of Jacob Sholem but bought with the funds of the partnership. There was a resulting trust in the real estate in favor of Samuel Sholem and Maurice Sholem in proportion to their interest in the partnership, which was one-third to each. Crone v. Crone, 180 Ill. 599."

See also Van Buskirk v. Van Buskirk, 148 Ill. 9. In Coddington v. Bevan, 315 Ill. 92, the court said (96):

"A trust in personal property may be created and proved by parol, and when such trust is established it is well settled the beneficiaries of such fund may follow the fund into all forms of investment which it may assume. (Maher v. Aldrich, 205 Ill. 242.)"

In our opinion the tender and account properly included as part of the partnership assets the personalty of the joint account.

Plaintiff further contends that if there was a valid option, defendant failed to exercise it within a reasonable time, that he waited nearly nine months after Samuel Altschuler's death before informing her or any of her representatives that he intended to exercise the option, and that it was not until suit was brought that he attempted to exercise the option. Conferences between defendant and plaintiff's representatives began at the end of February, 1945, and continued through the spring and summer of that year. Defendant testified that during these conferences he told Mr. Yedor, one of the attorneys for plaintiff, and also her brother, that he had an option and wanted to exercise it to purchase Samuel Altschuler's interest, and that he, Mr. Yedor, "must have told it" to his sister. Plaintiff testified that she was not

told prior to November 3, 1945 that the defendant wanted to exercise the option. Mr. Yedor did not take the stand and there is no denial that he was informed. As early as February or March, 1945, Mr. Yedor was shown the partnership agreement by the defendant, and in June the document was shown to plaintiff's accountant and Mr. Yedor. The master found that the parties "conferred at length" prior to the suit "in order to attempt to arrive at a statement of the amount due plaintiff." We are of the opinion that the "attempt to arrive at a statement of the amount due plaintiff" was concerned with ascertainment of the amount due plaintiff under the option. Without an understanding that the business was to be continued by the defendant, neither the defendant nor plaintiff's representatives would have attempted at long conferences to formulate "a statement of the amount due plaintiff"; instead, the defendant would have been engaged, as would have been his duty, in winding up the business, in selling its assets and thereafter making a cash payment to the plaintiff based upon the proceeds derived from liquidation. We concur in the statement of defendant that the master and chancellor should have found that in February or March, 1945, the defendant notified the plaintiff through her representative, Mr. Yedor, of his intention to exercise the option; that thereafter until late August, 1945, plaintiff, through her representative, and the defendant sought to formulate "a statement of the amount due plaintiff" under such option; and accordingly that there was no unreasonable delay in the exercise of the option.

The same result is reached by the construction of the option agreement and applications of its provisions to the facts. The agreement contained no specific time for the exercise of the option. The law, therefore, fixes a reasonable time to be determined by the circumstances of the case. Larmon v. Jordan, 56 Ill. 204; Keefer v. United Elec. Coal Cos. 292 Ill. App. 36. Since the option was for the benefit of both Irwin and Samuel, one cannot assume that either intended to impose a strict limitation for exercising the option. Such limitation might have interfered with his own rights. They merely provided that the tender was not to be made until after an account had been taken of all the partnership property and a computation made, based on net assets. Under this construction the tender was reasonably made. The evidence shows that the accountants were employed on February 21, 1945, to prepare the statement of account, and they were continuously so engaged until November 2, 1945, the day before the tender was made.

Plaintiff asserts and the master found that the statement of account and attempted tender was ineffectual because it included nothing for the good will of the business. It will be observed that neither the master nor the chancellor found, as a matter of fact, that good will existed at the time of Samuel Altschuler's death. We agree with defendant that the evidence shows that there was no good will as a partnership asset and that the accountants were correct when in their professional judgment they determined not to set up such an item in their audit and statement of account. Good will is not a tangible asset and not all businesses possess good will. (In re Brown, 242 N. Y. 1, 150 N. E. 581; Securities Realization Co. v. Peabody & Co., 300 Ill. App.

156.) There was nothing in the trade name of the dissolved partnership, the site of its business, or its product which could be said to represent good will. The business consisted of a small office and junk yard; its product was the iron and scrap-metal which was bought and sold. Whatever earning potentiality it enjoyed lay largely in the "connections" with industrial suppliers and purchasers that Irwin Altschuler was able to maintain. "It has frequently been held that good will does not adhere to a business * * * dependent solely on the personal ability, skill, integrity or other personal characteristics of the owner." Plaintiff asserts that defendant's position is inconsistent in that in their amended counterclaim they demand that plaintiff, as executrix, execute and deliver to defendant an assignment of her interest and the interest of decedent in said business, together with the good will thereof. The prayer in the counterclaim does not mean that there was good will. The amended answer contained a denial that there was any good will or any of value. Defendant's explanation that the prayer only meant that he desired the good will to be covered by the assignment in order to avoid any further dispute about it, impresses us as a reasonable one. Plaintiff contends further that the statement of account and attempted tender were ineffectual because there was not included either interest on the share of Samuel Altschuler in the partnership property or the proportionate share of the profits of the business which would have been earned on his share from the time of his

death on February 10, 1945 to November 3, 1945. Under the agreement the purchase price payable to the legal representative for the deceased partner's interest is specified as a fixed percentage of net assets. Nowhere is there provision for a sharing by the legal representative in any profits accruing after death and resulting from the endeavors of the continuing partner, or for interest on the purchase price. By the same token there is no provision for a diminution of the purchase price if the business is unsuccessful after the death. The case of Douthart v. Logan, 190 Ill. 243, did not involve a contract with an option to purchase the deceased partner's interest, and in our opinion is not applicable to the factual situation in the case at bar.

Plaintiff asserts that the statement of account and the attempted tender was ineffectual because it included one half interest in the real estate which Samuel Altschuler specifically devised to Evelyn Altschuler, his wife. In January, 1938, Ida Altschuler, the mother, died. By her will she devised to the children, Irwin, Samuel, Sadie and Sarah, share and share alike, four parcels of realty owned by her at her death, including the two parcels on which the business known as the Altschuler Iron & Steel Company was located. About a year and a half after the final account of the executor was approved, the children agreed to exchange their respective interests in the four parcels for the convenience of Irwin and Samuel in order to permit the latter to own entirely the two parcels of realty used in the conduct of their business.

Accordingly, on September 4, 1940, by a series of related conveyances, the title to the realty where the business was conducted and to the adjoining property was vested in Irwin and Samuel as tenants in common. At the same time the two remaining pieces of realty were conveyed, one to Sadie as her sole property, and the other to Sarah as hers. The relative value of the different parcels was disregarded in the exchange. The properties conveyed to the men were used in the operation of the partnership business until Samuel's death. Real estate taxes and building expenses relating to the realty were paid out of partnership funds. The parcels acquired by the women were of much greater value, estimated at three to four times that of the business property. The realty on Baltimore Avenue and adjoining thereto was acquired by the two partners on account of the partnership and it was so used. The substantial monetary loss which both men incurred in acquiring the realty is explicable in terms only of such purpose and intention. Their mutual intention and understanding was to acquire the realty for the partnership business and their subsequent conduct is shown by their use of the property and their payments of taxes and repairs out of partnership funds corroborates the existence of such intention and understanding.

Sec. 8 (1) of the Partnership Act, (Sec. 8, Ch. 106-1/2, Ill. Rev. Stat. 1947) provides:

"All property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership is partnership property."

That realty is purchased or acquired in the names of the partners and not in the name of the partnership does not prevent

it from being owned and held as partnership property. Wharf v. Wharf, 306 Ill. 79, 85-86; Altman v. Altman, 271 A. D. 884, 67 N. Y. S. (2d) 119, 121. "If by all the circumstances attending the transaction, it is made to appear that, in the intention of the parties, it was purchased for and was treated as partnership property, the presumption of ownership arising from the face of the deed will be overcome, and the property will be treated as belonging to the partnership." (20 R. C. L., sec. 61, p. 855.) See also Galbraith v. Tracy, 153 Ill. 54, 60, 64. We find that the chancellor committed error in determining that the real estate used in the business was held by Irwin and Samuel Altschuler as tenants in common and that it is now held by plaintiff and defendant as tenants in common, and that he should have found that such realty was an asset of the partnership dissolved by the death of Samuel and includible in the tender made by defendant on November 3, 1945.

The record in this case convinces us that defendant dealt fairly, honestly and equitably with his father, mother, brother and sisters, and that plaintiff has no just complaint. Therefore, the decree of August 25, 1947, of the Superior Court of Cook County is reversed and the cause remanded with directions to dismiss the complaint for want of equity at plaintiff's costs, and for further proceedings as to the counterclaim not inconsistent with the views expressed. The decree of September 12, 1947, is modified insofar as it taxes the master's fees and other costs against defendant.

DECREE OF AUGUST 25, 1947,
REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.
DECREE OF SEPTEMBER 12, 1947,
MODIFIED.

LEWE, P.J. AND KILEY, J. CONCUR.

DEAR, DR. MAX MEYER, I AGREE.

SINCERELY YOURS,
MARGARET FLOY WASHBURN
(MRS. JOHN DE WITT WASHBURN)
VASSAR COLLEGE,
POUGHKEEPSIE, N.Y.

it from being owned and held as partnership property. Wharf v. Wharf, 306 Ill. 79, 85-86; Altman v. Altman, 271 A. D. 884, 67 N. Y. S. (2d) 119, 121. "If by all the circumstances attending the transaction, it is made to appear that, in the intention of the parties, it was purchased for and was treated as partnership property, the presumption of ownership arising from the face of the deed will be overcome, and the property will be treated as belonging to the partnership." (20 R. C. L., sec. 61, p. 855.) See also Galbraith v. Tracy, 153 Ill. 54, 60, 64. We find that the chancellor committed error in determining that the real estate used in the business was held by Irwin and Samuel Altschuler as tenants in common and that it is now held by plaintiff and defendant as tenants in common, and that he should have found that such realty was an asset of the partnership dissolved by the death of Samuel and includible in the tender made by defendant on November 3, 1945.

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DECREE OF AUGUST 25, 1947, REVERSED AND CAUSE REMANDED WITH DIRECTIONS.
DECREE OF SEPTEMBER 8, 1947, MODIFIED.

LEWE, P.J. AND KILEY, J. CONCUR.

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154 A

44942

HAROLD N. SAMUEL, Appellant, v. LEE-TEX RUBBER PRODUCTS CORPORATION, a Corporation of the State of Illinois, Appellee.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

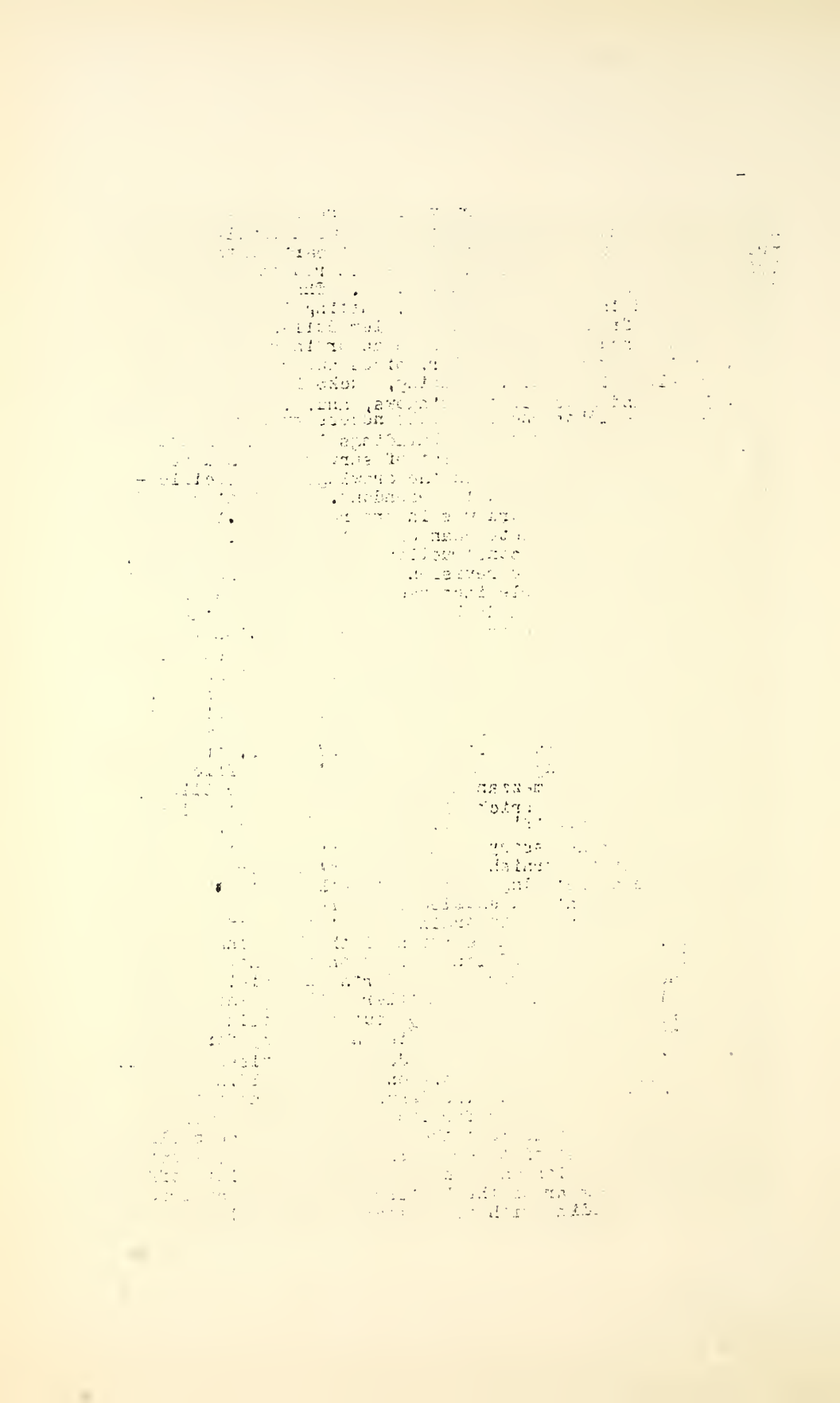
340 I.A. 220

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Harold N. Samuel filed an amended two count complaint in the Circuit Court of Cook County against Lee-Tex Rubber Products Corporation. Count I alleges:

"1. That plaintiff is, and was at all times during the performance of services to and for the defendant hereinafter set forth, a professional engineer, duly qualified and registered to practice professional engineering in the State of Illinois. 2. That on or about November 25, 1946 plaintiff, upon the request of the defendant, submitted a written proposal to furnish the drawings, plans, superintendence and supervision necessary for the remodeling and rehabilitation of certain buildings located on the property at 2762-92 Clybourn Avenue; that said proposal provided for the payment to plaintiff of three per cent (3%) of the cost of labor and materials necessary to complete the remodeling to cover the cost of plaintiff's office help, superintendence and supervision; that said proposal further provided for the payment to plaintiff of a profit equal to six per cent (6%) of the cost of the labor and materials necessary to do said remodeling; that said proposal of November 25, 1946 is set forth in an exhibit marked Exhibit A, which by reference is incorporated herein and made a part hereof as though fully set forth herein. 3. That defendant accepted said proposal and directed and engaged the plaintiff to proceed with said work. 4. That said proposal covered the furnishing of the necessary labor, material, superintendence and supervision on a one story building with base dimensions of approximately 80 feet x 80 feet, together with a section of a building (hereinafter for convenience referred to as the front of the Rattler Building) having base dimensions of approximately 176 feet x 80 feet; that there is attached hereto an exhibit, marked Exhibit B, which by reference is incorporated herein and made a part hereof, being a photo-

static copy of a plat of survey of the real estate involved herein; that the original construction work involved in the proposal set forth in Exhibit A is that part of the survey lying north and east of a line drawn in red on said photostatic copy of the plat of survey. 5. That the original work proposed involved, generally, putting in a cement floor in the front room of the Rattler Building, removing the old roof and replacing it with an ordinary flat tar roof, installing a small boiler, pipes and radiators for heating, electrical work, plumbing, tuckpointing, putting sash, frame and glass in the windows, and, in general, furnishing the labor and materials necessary for the remodeling and rehabilitation of the buildings lying north and east of the red line on the plat of survey attached as Exhibit B, in accordance with the drawings and specifications originally submitted to defendant. 6. That defendant thereafter, while the work was in progress, directed the plaintiff to make complete changes in the design, structure, type and extent of the construction originally undertaken, necessitating a complete revision of the plans and specifications at a considerable increase in cost; that among the changes directed to be made by the defendant were the following: (a) Change from ordinary construction to steel and concrete construction; (b) Eliminating the support of four rows of posts necessitating the reconstruction of the building so that the structural support is on one row of posts and the outside walls. (c) Changing the height of the building by raising the roof to a height that would later permit the installation of a second floor, or mezzanine; (d) Designing, laying out and construction of offices on the second floor, or mezzanine, with acoustical ceilings, tile floors and glass brick windows, together with plaster walls and high grade trim or finishing; (e) Change from the small boiler necessary to heat the building to a larger size sufficient to furnish steam and heat required for the defendant's manufacturing process, together with the additional equipment and skilled labor required by such change; (f) Change from ordinary flat tar roof to a fireproof roof. .7. That the portion of the buildings lying south and west of the red line marked on the photostatic copy of the plat of survey as set forth in Exhibit B was a foundry building known as the Rattler Building which had theretofore been used for shaking out or rattling out the molding sand from the molds used in the foundry formerly occupying the building; that the defendant advised plaintiff that it desired to use the portion of the building lying south and west of the red line drawn on said photostatic copy of the plat of survey for its manufacturing operation so that defendant could rent the front part of the building lying north and east of the red line to a tenant (excepting therefrom that portion which had been converted into office space); that the rear of the Rattler Building is an irregular portion of a building with floor space of approximately ten



thousand square feet, more or less; that there is an additional portion of the building with floor space of 24 x 185 feet. 8. That such additional changes requested by defendant necessitated the preparation of new and additional plans and specifications, by the plaintiff, and a corresponding increase of cost; that the additional work ordered and directed by the defendant entailed the following, generally: (a) Redesigning the rear of the two buildings by repairing the floors and walls, by irs talling plumbing, heating, frames, sash, glass and glass brick; (b) Tuck-pointing of all walls where needed; (c) Installation of a new roof on the small rear building and patching of the roof on the larger rear Rattler Building: (d) Installation of a false ceiling in the rear of the large Rattler Building; (e) Installation of a fire wall, approximately 237 feet long, extending along the red line appearing on Exhibit B, required by the underwriters laboratory because defendant was engaged in the manufacture of textiles (that to construct said fire wall it was necessary to remove most of the wall previously built by plaintiff along said red line). 9. That the defendant subsequently rented the front portion of the building lying north and east of the red line as shown on Exhibit B to a tenant; that in negotiating the lease for said area the prospective lessee demanded certain structural modifications and alterations; that plaintiff, upon the specific order and direction of the defendant, prepared the necessary plans and specifications to provide for the construction changes requested by the prospective lessee, and submitted said plans and specifications to the defendant for approval; that defendant approved the plans and specifications, with some minor modifications, and incorporated them in the terms of the lease, as an exhibit, executed with the lessee; that defendant thereupon ordered and directed the plaintiff to proceed with the construction work required in accordance with such plans and specifications, which resulted in a considerable increase in cost; that such additional work, generally, entailed the following: (a) Installation of shipping facilities for tenant's use which required tearing down a portion of the building, constructing a loading dock with a fire wall and laying concrete pavement for the driveway to the street; (b) Designing, laying out and constructing offices for the use of the tenant; (c) Designing, laying out and constructing four washrooms and rest rooms for men and women for both the office employees and the factory employees; (d) Designing and constructing a separate entrance for the exclusive use of the tenant; (e) Redesigning and reconstructing the installation of heating units to provide adequate heat for office space of tenant. 10. That the plaintiff between November 25, 1946 and January 21, 1948 furnished the necessary engineering skill, data, drawings, supervision of the work and superintendence necessary to

the completion of the work ordered and directed by the defendant, and in all respects complied with the terms and conditions agreed upon with the defendant; that all the services so performed by the plaintiff were performed in a satisfactory manner with a high degree of engineering skill and were accepted by the defendant. 11. That, although the estimated costs of labor and materials for the completion of the work in accordance with the original plans and specifications submitted to the defendant and referred to in the proposal set forth in Exhibit A were $45,000.00, the total cost of labor and materials for the completion of the work ordered and directed by defendant, resulting from the many modifications and alterations hereinabove set forth, was $117,162.34; that based upon the unit pricing percentages set forth in the proposal of November 25, 1946 and accepted by the defendant, the plaintiff has earned, and is entitled to the following compensation for his services rendered:

(a) Three per cent (3%) of the total cost for the drafting of working drawings, plans and engineering data $3,514.86

(b) Three per cent (3%) of the total cost to cover the cost of office help, superintendence and overhead generally $3,514.86

(c) Six per cent (6%) of the total cost as profit $7,029.72

making a total compensation earned in the aggregate amount of $14,059.44

12. That defendant has paid on account the sum of $5,896.08, leaving a balance due and owing the plaintiff in the amount of $8,163. 36; though plaintiff has often requested defendant to pay said amount, the defendant has refused, and does now refuse, to pay the balance justly due and owing to the plaintiff."

In Count II plaintiff realleged Paragraphs 1, 5, 6, 7, 8 and 9 of Count I, and further alleged:

"2. That between the 25th day of November, 1946 and January 21, 1948, the plaintiff, at the special instance and request of the defendant, performed services as a professional engineer for the defendant in conjunction with the remodeling and rehabilitation of certain buildings located on the property commonly known as 2762-92 Clybourne Avenue. 4. That the plaintiff furnished the necessary engineering skill, data, drawings, supervision of the work and superintendence necessary to and for the completion of

the work ordered and directed by the defendant hereinabove set forth; that all the services so performed by the plaintiff were performed in a satisfactory manner with a high degree of engineering skill and were accepted by defendant. 5. That the reasonable value of said services was the amount of $14,059.44. 6. That defendant has paid on account the sum of $5,896.08, leaving a balance due and owing the plaintiff in the amount of $8,163.36; though plaintiff has often requested defendant to pay said amount, the defendant has refused, and does now refuse, to pay the balance justly due and owing to the plaintiff. Wherefore plaintiff prays that a judgment be entered herein against the defendant and in favor of plaintiff for the sum of $8,163.36, plus costs."

Exhibit A, attached to the complaint, is a letter dated November 25, 1946, signed by plaintiff and addressed to defendants, and reads:

"As you requested, I have furnished you with the preliminary set of drawings to accompany your application for construction authorization to be issued by the CPA. In order to complete the final working drawings it is necessary to have a survey made of the property which will show the exact property lines and also the existing grades. I have ordered this survey and will be in a position to proceed with the plans as soon as this is received. While we had a verbal discussion on terms covering the work in question, I think it is advisable to have some written agreement or, if you prefer, a formal contract. In line with my understanding, I feel that the most satisfactory form of agreement to speed the construction work and also to afford you the maximum production would be as follows: 1. I will proceed to complete the necessary working drawings, plans, and engineering data required by the City of Chicago in order to secure a building permit and my fee for this work will be $1250.00, which I estimate is approximately 3% of the cost of the work involved. The plans become the property of you and you can secure competitive bids from any contractors or builders that you may wish to call in and you are at perfect liberty to let the actual construction work to anyone you so desire. 2. After the plans are completed, I will furnish you with a complete breakdown of the estimated costs showing in detail the pricing of all items of labor and material. We are attaching herewith, marked Exhibit 1, a sample of such an estimate. We would be pleased to carry out the actual construction work on the following basis: A. The charges for labor on the job will be for the men who are actually at work on the building with their tools and no charge of any kind will be made for office help, time keeper, super-

intendence, and so forth. Each week the payroll sheet will be submitted to you as per Exhibit 2 attached showing the workman's name, hours, rate of pay, and his total time, to which will be added the liability insurance, and these weekly statements are to be paid when received by you. B. On or before the 10th day of each month we will submit to you a statement showing the total material and labor cost for the preceding month as per Exhibit 3 attached. With this statement we will also attach all the material bills showing the actual cost of the material less the normal trade discount and attached to each bill will be our check to the supply house covering the payment of the invoice. To the total sum represented on these statements we will add 3% to cover the cost of office help, superintendence, etc. and will receive, in turn, from you a check for this payment. C. Our profit for carrying out this work will be a fixed amount based on 6% of the estimated cost which, in this case, will probably be around $45,000, and the fee would be $2,700.00. This fee will be due in installments as the job progresses and the first amount will be due thirty days after the payment of the first monthly statement has been made and will be based on 6% of the amount of that payment. If, at any time, you should become dissatisfied with the way the work is progressing, we will be glad to stop the work and any fees for the previous thirty days together with the unbilled amount of the fee will be cancelled. I feel that this plan holds the following advantages for you and also for myself; 1. It allows the work to start at once and not wait for the taking of detailed bids from the sub-contractors. 2. It allows the substitution of materials if certain items are unobtainable without having to change the contract price and secure new sub-figures. 3. It gives you protection, as you will be able to omit any portion of the work or add to the work without any change in the unit pricing. 4. It allows you the trade discount on all materials which the contractor usually pockets. 5. It cuts the ordinary contractor's overhead and contingency item together with his profit from a normal 20% or 25% to 9%. 6. It allows you to terminate the contract at any time based on the actual cost of the work to that date. 7. It benefits me in that, for a small overhead and profit, I do not have to advance any large amount of working capital to carry on the work and also eliminates the contingency item which xx normally we have to include when giving a definite price. 8. With my fee being fixed and not due me until thirty days after the first payments, I have no incentive to run up the building costs and every incentive to complete the work as soon as possible so that I can take the men from this work and transfer them to other possible work which we have under schedule. Please let me know how this appeals to you so that we can be prepared to start the work immediately after you receive the CPA approval."

Exhibit "B" attached to the complaint, is a "plat of survey," dated January 27, 1947, showing the building or buildings on a triangular parcel of land in Chicago between Clybourn Avenue on the northeast and North Damen Avenue on the west, with the apex pointing toward Diversey Parkway. The plat shows the dimensions of and buildings on the tract. It also shows a red line commencing at a point on the southeast base line 96.04 feet southwest of the Clybourn Avenue property line and extending in a straight line in a northwesterly direction parallel with the Clybourn Avenue property line to Damen Avenue, approximately 238 feet. Defendant's motion to strike the amended complaint, which specifically pointed out alleged defects, was sustained, and judgment entered against plaintiff, to reverse which he prosecutes this appeal.

Defendant's motion to strike the amended complaint admitted facts well pleaded, but not conclusions of law or conclusions of fact unsupported by allegations of specific facts upon which such conclusions rest. We agree with plaintiff that the facts set forth in the amended complaint, and which must be taken as true on this appeal, briefly stated are that plaintiff wrote defendant a letter on November 25, 1946, prior to the commencement of his service, setting forth that he would charge defendant for his services as follows: 1. $1,250 for plans, engineering data etc., which the letter states plaintiff estimated is approximately three percent of the cost of the work; 2. Three percent of the actual cost of labor and materials to be paid to plaintiff to reimburse

him for office help and superintendence; and 3. $2,700 for his profit based on six percent of the estimated cost of $45,000. Defendant accepted the proposal contained in the letter and directed plaintiff to proceed with the work. The amended complaint alleges in detail some of the changes requested by defendant and some of the additional work not originally involved in the set of drawings furnished to defendant. Plaintiff seeks recovery of the reasonable value of his services which, based upon the pricing set forth in the letter, is $8,163.36, after giving credit to defendant for payments made by it. The total cost of labor and materials for the completion of the work directed by defendant, including modifications and alterations, was $117,162.34.

The court held that plaintiff was limited to a recovery based on an estimated cost of $45,000. However, the letter states that plaintiff is to receive three percent to cover overhead based on the actual cost of labor and materials. Plaintiff points out three percent of $117,162.34 results in his being entitled to $3,514.86; that this sum for overhead when added to the $1,250 for plans and $2,700 for profit (the last two items being computed as the court interpreted the letter) totals $7,464.86; that defendant has paid only $5,896.08, leaving a balance due plaintiff, under the court's interpretation of the letter, of $1,568.78; and that in the judgment entered plaintiff was denied all recovery. Defendant urges that plaintiff has the burden of alleging the formation of a new contract or contracts in such form as would operate to change the plain words of his own written contract, Exhibit

A, and that this exhibit is only partially set forth. The exhibits to the letter of November 25, 1946, are (1) a sample of the estimate to be used; (2) a sample payroll sheet; and (3) a sample statement to be rendered monthly showing the total labor and material costs. In our opinion plaintiff's amended statement of claim sets forth ultimate facts sufficient to state a cause of action. The omission from the complaint of the three exhibits mentioned in the letter of November 25, 1946, did not make the complaint vulnerable to defendant's motion.

The ultimate facts pleaded in the complaint show that the plaintiff's proposal of November 25, 1946, was accepted by defendant; that this agreement was abrogated, modified or changed by the request of defendant to do other and additional work; that plaintiff performed the work and is entitled to the reasonable value of his services; and that the reasonable value should be determined on the basis of the letter or proposal. Defendant contends that the complaint fails to allege the dates on which the various requests were made concerning the changes in the work; the specific work to be done; or to set forth a complete breakdown of the estimated costs showing in detail the pricing of all items of labor and material; and that the various sets of plans and specifications involved in the work should be attached. It was unnecessary for plaintiff to particularize to the extent demanded by defendant. Plaintiff stated the ultimate facts. He should not plead his evidence.

Defendant states that the claim of plaintiff is in complete disagreement with the provisions of his own contract, the letter of November 25, 1946. The letter was not a complete contract. It is apparent that before the dispatch of the letter the parties had preliminary conferences. The letter was a proposal and also stated inducements which presumably would be calculated to appeal to the officers of defendant. Apparently, no "written agreement" as contemplated in the letter was entered into. Defendant, however, accepted the proposal contained in the letter. The letter does not identify the buildings or the property. It speaks of "work" and "the job." Plaintiff alleges that the construction work involved in the proposal is that part of the survey lying north and east of the red line in the photostatic copy of the plat of survey. We cannot agree with defendant that by the terms of the letter of November 25, 1946, plaintiff committed himself to a fixed amount based on six percent of $45,000, or $2,700. This language refers to the work contemplated by the letter. Defendant calls our attention to paragraph 8 of the letter, wherein as an inducement to defendant to make the contract with plaintiff, the latter pointed out that "with my fee being fixed and not due me until thirty days after the first payments, I have no incentive to run up the building costs and every incentive to complete the work as soon as possible so that I can take the men from this work and transfer them to other possible work which we have under schedule." Under the allegations of the

amended complaint the work therein referred to would be the "work" contemplated in the letter. In that letter it was contemplated that the cost would "probably" be around $45,000. Under the allegations of the amended complaint the total cost of labor and materials was $117,162.34. The fee of six percent became due in installments as the job progressed. If at any time defendant should become dissatisfied with the way the work was progressing, plaintiff promised to stop the work, and that his fee for the previous thirty days, together with the unbilled amount of the fee, would be cancelled. If the cost of the job were less than $45,000 we are inclined to the view that plaintiff would be entitled, as a profit, to six percent of the cost and not to $2,700. It will be observed that plaintiff avers that he furnished the necessary engineering skill, data, drawings, supervision of the work and superintendence necessary to and for the completion of the work ordered and directed by the defendant, and that all such services were performed in a satisfactory manner, with a high degree of engineering skill, and were accepted by the defendant. Plaintiff furnished the services and performed the oral agreement. He is not claiming under an executory contract for breach of an agreement for services to be rendered. See Sharkey v. Miller, 69 Ill. 560; Loeber v. Horrie, 167 Ill. App. 311; and Penn-American Plate Glass Co. v. Hawes, 170 Ill. App. 224.

In support of its position defendant cites Wuellner v. Illinois Bell Telephone Co., 390 Ill. 126. There the contract provided that should the "actual cost plus the con-

tractor's fee exceed the guaranteed maximum amount, such excess shall be borne by the contractor." The contract further provided that the guaranteed maximum amount "may be increased or decreased by additions or deductions, but only by change orders in writing signed by the architect and the owner, as provided for by Article Five herein." The court said that "the appellee waived the requirement that the added cost be agreed to in writing." The Wuellner case is not authority for the defendant under the factual situation presented by the amended complaint in the case at bar. Defendant maintains that the complaint is insufficient because it fails to allege performance of material duties incumbent upon plaintiff, fails to allege an excuse for such failure, and, insofar as said obligations were to be evidenced by drawings, specifications and writings, no such documents are attached to the complaint, and that neither the Civil Practice Act nor the courts have held that it is unnecessary to set forth ultimate facts upon which to base a cause of action. In our opinion the complaint alleges performance. We have held that the complaint sets forth sufficient ultimate facts to state a cause of action.

Finally, defendant urges that the complaint fails to set forth that the plaintiff was an architect duly licensed to practice his profession; that it alleges that he was a structural engineer and that the work he performed consisted almost entirely of architectural services; and that under such circumstances he is practicing the profession of architect contrary to the law and therefore cannot recover, and

that this appears from the face of the complaint and is not an affirmative defense. The complaint alleges that plaintiff is a "professional engineer." In Keenan v. Tuma, 240 Ill. App. 448, it was held, in effect, that an individual has the right to employ a licensed architect. The complaint in the case at bar alleges that plaintiff undertook and agreed to furnish the labor and material to complete the project and to furnish the plans and specifications. We agree with plaintiff that this does not mean that plaintiff was the architect and rendered the architectural services. The point urged by defendant does not appear from the complaint. This is an affirmative defense which may be presented in an answer.

The views expressed herein assume the truth of all that is well pleaded. We do not express any view as to the facts or the merits of the case. For the reasons stated the judgment of the Circuit Court of Cook County is reversed and the cause is remanded with directions to proceed in a manner not inconsistent with the views expressed.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

LEWE, P.J. AND KILEY, J. CONCUR.

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44696

ARTHUR J. SCHMITT, Appellant and Cross-Appellee, v. CONTINENTAL - DIAMOND FIBRE COMPANY, a corporation, Appellee and Cross-Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

340 I.A. 221

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is the third appeal in this suit for an accounting. In the first appeal (Schmitt v. Wright, et al., 283 Ill. App. 628) this Court reversed a decree based upon an order sustaining a demurrer to the complaint. In the second case (Schmitt v. Wright, et al., 317 Ill. App. 384) a decree for an accounting in plaintiff's favor was affirmed. The present appeal is by plaintiff from a decree entered October 20, 1948, based on the accounting. Defendant Company has cross-appealed. J. Pilling Wright, defendant, died before the instant decree was entered and, as to him, the suit has abated. We shall refer herein to Continental-Fibre Company as defendant.

Plaintiff organized the Walnart Electric Manufacturing Company in 1922 to fabricate bakelite products for use principally in radio manufacturing. Walnart was supplied raw materials mainly by defendant then, before its merger with the Diamond Company, Continental Fibre Company. On May 4, 1925, Walnart owed defendant more than $86,000.00 and

had not sufficient liquid assets to meet this and other obligations. Plaintiff owned practically all of the Walnart stock and made an agreement on May 4, 1925, with defendant under which he transferred his Walnart stock to Wright, Treasurer of Continental. Under the agreement control of Walnart passed to Continental. The agreement provided that within four years upon payment of the debt to Continental the stock, at plaintiff's request, was to be reassigned, otherwise the stock to pass into the ownership of Continental. September 30, 1926, Walnart, by plaintiff President, in consideration of Continental's promise to pay certain Walnart obligations, assigned and delivered to Continental all Walnart business, patents, and patent rights, good will, books, accounts, etc., not including real estate and equipment at 308-310 S. Green Street, Chicago. October 1, 1926, the Green Street realty and equipment was leased to Continental in consideration of a nominal rent and assumption of certain obligations of Walnart. Plaintiff's stock was not returned to him under the 1925 agreement and at the end of the four year period, defendant instituted proceedings to dissolve Walnart. It was dissolved in 1930. Plaintiff filed this suit on December 29, 1932.

Trial on the merits following the first appeal resulted in a decree for accounting July 3, 1941. Defendant and Wright were ordered to account for all profits of Walnart from May 4, 1925, to October 1, 1926, and in view of the fiduciary relationship, defendants to be charged with their

profits from the operation; for the assets, business, etc., taken under the transaction of September 30, 1926; and for the use of the "assets and properties, the business, building, machinery and equipment" of Walnart by defendants from October 1, 1926 to date of the accounting. Profits of defendants after October 1, 1926 were not to be accounted for "except in so far as it may be proper and necessary to account for such profits for the purpose of determining the reasonable value of the use of said assets and said properties." Credits between the companies were to be adjusted and whatever balance remained due Walnart was to be paid plaintiff and the other stockholders.

This court in affirming the decree (317 Ill. App. 384) decided that the May 4, 1925, transaction was a pledge of plaintiff's stock to secure the Walnart debt; that the contract created a trust relationship; and that the assignment of September 30, 1926, and the lease of October 1, 1926, could not stand. Leave to appeal was denied by the Supreme Court, 321 Ill. App. XIV. Thereafter the Chancellor referred the taking of the account to a Master. The Master reported an adjustment of accounts as shown in the summary hereinafter, and recommended that defendants be directed to convey the Green Street real estate to plaintiff and other stockholders according to their stock interest. The decree, which is the one now before us, approved the report and directed payment of the amount found due and ordered the conveyance.

This the Master's summary:

AMOUNTS DUE DEFENDANT

Item No.		Amount
1	Note of Walnart for $86,762.13 less O'Brien credit of $1,911.24.....	$ 84,850.89
2	Interest on foregoing note (making proper reduction for the O'Brien payment of $1,911.24 on August 1, 1925) from May 2, 1925 to October 1, 1926 at 6 perc.	7,240.99
3	Purchases by Walnart during period May 4, 1925 to October 1, 1926.....	60,651.20
5	Bank loans of Walnart paid by the def.	77,000.00
9 & 11	Mortgages on Green Street property paid off by defendant.....	40,000.00
15	Uncollectible accounts and allowances.	8,543.42
17	Legal fees and collection expenses....	627.43
	Total Due Defendant.	$278,913.93

AMOUNTS DUE PLAINTIFF

19-24, incl.	Cash on hand, etc.....	$ 21,019.82
26	Machinery and equipment.....	62,963.68
28	Accounts receivable.....	40,439.21
30	Inventory.....	109,576.59
32	Profits of defendant on sales to Walnart 5/4/25 to 10/1/26.....	108,791.88
	Total Due Plaintiff.....	$342,790.98

RECAPITULATION

Total Due Plaintiff.....	$342,790.98
Total Due Defendant.....	$278,913.93
Balance Due Plaintiff.....	$ 63,877.05

The basis for the Master's Report is a statement of account by defendants and plaintiff's exceptions and surcharges thereto. As trustee defendant had the burden of sustaining the statement. The statement and exceptions did not pertain to the question of profits after October 1, 1926. We believe that the trial court properly admitted testimony of the profits so far as it was useful in determining the

reasonable value of the use of whatever defendant took under the transactions of September 30 and October 1, 1926.

The account for the assets, business, and goodwill and for the use of the assets, property, business, building and machinery and equipment is said by the Master to be stated under items 1-35 except 32 shown in the summary hereinbefore. We agree with plaintiff that since this adjustment of credits is limited in time to October 1, 1926, that it follows that in those items no allowance was made for the use of the assets, business, etc., after that date. From this alone it does not follow that the order in the July 3, 1941 decree was disregarded. We infer from the Report that the Master believed that any increase in value of the business after that date was due either to defendant's management, or the commingling of defendant's assets with Walnart or a combination of these or any of them with the prosperous economic conditions and that he concluded therefrom that plaintiff was not entitled to an accounting of that increased business.

There is testimony that after October 1, 1926, Continental and later defendant used Green Street property, Walnart machinery and equipment, its "secret process"; fabricated mostly the same parts, continued employment of substantially the same personnel; and used Walnart's customer list in selling its products. There are written statements of deceased Wright that Walnart was being preserved intact available for redemption by plaintiff under the May 4, 1925, contract. There is

testimony for defendant of discontinuance of making part of Walnart products, of discontinuance of keeping its books, and of the reduction of its force of employees just before October 1, 1926. We see no reason to disturb the implicit finding that Walnart continued in existence after October 1, 1926.

Plaintiff contends he should be credited with $1,810,711.00 as the value of the use of the Walnart business from October 1, 1926, to December 31, 1931. That is eight times the average annual earnings of defendant's Chicago plant during that period. It is based on a formula presented by plaintiff's expert witnesses. No contrary expert testimony was offered by defendant. No case is cited by plaintiff covering precisely the contention he makes.

The general rule is that where damages through loss of business profits are sought, the loss consists of the profits which would have been made had the wrongful act not been done and that the basis of measurement of the loss is the profit record for a reasonable period next preceding the wrongful act. Chapman et al. v. Kirby, 49 Ill. 211; 25 C. J. S. 518. The evidence fairly shows that Walnart in 1925 was unable to pay its debts; had no borrowing capacity; had pledged its material as security for a loan; that it owed its employees back salaries; had been advised by attorneys to file a petition in bankruptcy; and that on October 1, 1926, despite Continental

management and financial aid, financial condition of Walnart was even worse that it was on May 4, 1925. Our opinion is that had Walnart not been converted on October 1, 1926, it would have had to cease operations soon thereafter for want of liquid capital, and would have made no profits under plaintiff's management after October 1, 1926. There is no basis therefore for estimating damages to the stockholders through loss of profits and a fortiori no basis upon which to make the computation which plaintiff's experts made in this case. The most that might be said of the use of the business is that in plaintiff's hands it had a potential value which became actual when given adequate financing and management by defendant during a good business period. Under our decision in the earlier appeal defendant was constructive trustee of whatever it took from Walnart on October 1, 1926. Nevertheless plaintiff was required to prove as a basis for the allowance claimed, a profitable business operation. The question is not what profit the wrongdoer made but what profit the lawful owner would have made had his business not been converted. Conviser v. J. C. Brownstone & Co., 205 N. Y. S. 82.

The cases of Yates v. Whyel Coke Co., 221 Fed. 603, and United Electric Coal Companies v. Rice, 22 F. Supp. 221, are not helpful to plaintiff's contention. They involve damages to, not conversion of, businesses. Both announce the rule requiring proof of prior profit record as a basis

of measuring damages. The formula proposed by plaintiff's experts is no substitute for the prior profit basis in the general rule. A party wrongfully prevented from embarking on a new business venture, cannot recover expected profits, for there is nothing by which to measure. Consumers' Pure Ice Company v. Jenkins, 58 Ill. App. 519. This bears on plaintiff's situation. The general rule has been said not to be a certain guide but the best obtainable and the most reasonable basis for determining losses which the nature of the cases would permit. Fitzsimmons v. Munch, 79 Ill. App. 538. Allowance of the credit of $1,810,711.00 to plaintiff could be only on the basis of penalizing the defendant for its wrongdoing. This has no approval in law. Wrigley v. Larson, 5 Fed. (2) 731. The effect of the Master's finding is that there was no basis upon which to measure the value of the use of the business. We think this is correct as a matter of law.

Most of the remaining contentions relate to questions of fact. In Ennesser v. Hudek, 169 Ill. 494, the Supreme Court decided, adversely to Hudek v. Ennesser, 66 Ill. App. 609, that in an accounting case the Master's findings are no weighter than in any other type of case. In the instant case the findings were confirmed by the Chancellor, and we shall not disturb them unless against the manifest weight of the evidence.

The Master disallowed interest to plaintiff on items credited to him because there was no credit balance in his favor until given credit for the profits on de-

fendant's sales to Walnart in the decree of July 3, 1941. Plaintiff claims the credits were due and ascertainable October 1, 1926, and if given, would have then resulted in a credit balance in his favor. This disregards the credits due defendant at that time. We think it would be unrealistic to deny credit as of October 1, 1926, to defendant on the $71,000.00 obligation to the Wilmington Bank and the $40,000.00 mortgage on the Green Street property, payment of which defendant assumed on that date and which it later paid. We cannot agree with plaintiff that had defendant properly performed its trust prior to 1926, it could have paid Walnart debts owing it. We think the Master's finding is not against the manifest weight of evidence.

The Master disallowed plaintiff credit for rent on the Green Street property because defendant was not accountable for profits after October 1, 1926, and that any credit due plaintiff for use of its equity was balanced by defendant's payments of maintenance costs, taxes, etc., thereon under the lease. Plaintiff contends he should have been allowed a credit of $143,883.00 fair rental value and $76,986.00 interest thereon. Both parties on this issue refer us to the case of Van Buskirk v. Van Buskirk, 148 Ill. 9. The rule there stated (page 26) is that where the trustee has been guilty of fraud, misconduct or wilful default, it should pay what might have been received by the exercise of reasonable care and prudence but where it has acted in good faith, it is only accountable for what it has received. Implicit in the Master's

finding on this issue is the finding that there was no bad faith in defendant's handling of this property. The general imputation of bad faith to a constructive trustee is not sufficient to make the showing of bad faith on defendant's part in the rental of the building after 1930.

Continental took possession of the Green Street property under the lease of October 1, 1926. It occupied the building until early in 1930 when Walnart by Wright, President, and Anderson, Secretary, conveyed the property to defendant. The building was vacant thereafter until 1935. From February to October 1935 the Emergency Relief Corporation rented the building at $39.85 per month. It was vacant thereafter until 1937 when rented for $150.00 per month to May of 1940. In June 1940 to May 1942 it was rented at $175.00 per month and from thereafter to the date of the accounting at $200.00 per month. Plaintiff's expert on the question testified that it would be unusual for a property owner without cause to permit rentable premises to be vacant, that the property was mostly vacant between 1930 and 1934 and that similar buildings were about 20 per cent vacant at the time. Until plaintiff sued in 1932 defendant, presumably, considered itself the owner. It is hard to believe that during that time and while this suit was pending it would not take reasonable care in handling of the building. We think that the Master's finding on the question of bad faith is not against the manifest weight of evidence. We conclude that the rule in the Van Buskirk case applies

here to limit the defendant's liability to the rents actually received by it.

On October 1, 1926, defendant took over plaintiff's Accounts Receivable. It wrote off $11,595.11, credited Walnart with $40,439.21 and subsequently charged Walnart for $8543.42 accounts which it could not collect. The Master's finding was in favor of defendant on these items. Defendant wrote letters upon all of the Accounts Receivable which it took from plaintiff and where the account was not paid, turned it over to an attorney for collection. The Master credited defendant with $627.43 for the attorneys. Plaintiff claims both that defendant did not make a sufficient showing of care in attempting to collect the delinquent accounts and that it should not be allowed attorneys' fees. The record does not show that the Master's finding is against the manifest weight of the evidence on these items.

The Master credited plaintiff with a Walnart inventory of $120,740.83 on October 1, 1926. Defendant cross-appealed from this part of the decree. Defendant's statement of account credited Walnart $11,164.24 sales from inventory and $27,943.91 usable inventory. Plaintiff surcharged this statement with $109,001.43 and produced testimony to prove the value was more than $148,000.00. The inventory taken under the supervision of defendant's Anderson at the end of 1925 showed a value of more than $106,000.00 and defendant's books showed an inventory for the Walnart plant at the end of 1926 of $127,094.93. There

were conflicts in the testimony as to the true value of the inventory on October 1, 1926. The Master accepted the Walnart book value of the inventory as the true value. There was testimony that this was the true value. We see no reason to hold that the Master's finding is against the manifest weight of the evidence. There is no merit in defendant's contention that before filing suit plaintiff had accepted, by his failure to object, defendant's statement of the value of the inventory. Had plaintiff then known that defendant was a constructive trustee, he probably would have objected.

Defendant has cross-appealed also from that part of the decree which disallows interest of $234,423.70 on the Walnart note of May 2, 1925, on an open account accrued by Walnart on October 1, 1926, on the Wilmington Bank loans and on the Green Street mortgage payment all from October 1, 1926, to August 1, 1943. The Master allowed defendant six per cent interest provided on the Walnart note to October 1, 1926. Defendant considered itself the owner of the Walnart Company subsequent to October 1, 1926, and conducted it as its Chicago plant. The Walnart business thereafter was carried on the books of Continental. The defendant, at the time was a constructive trustee. To allow the interest claimed would be in effect to allow defendant to charge interest on money it loaned itself and to permit a constructive trustee to profit on trust transactions.

The Master allowed plaintiff a credit of $108,791.86 as profits of Continental out of the Walnart operation prior to October 1, 1926. Defendant in its cross-appeal contends this part of the decree is erroneous and that the credit should be about $49,000.00. Plaintiff says it should be $112,947.85. The total sales of Continental from May 4, to December 31, 1925, were $2,492,975.26 and from January to October 1, 1926, were $2,663,260.65. The total sales by defendant to Walnart during the first period were $218,244.09 and during the second period $113,574.00. The sales to Walnart during the first period were 8.75 per cent, and during the second period 4.26 per cent, of defendant's total sales during the periods. The cost of the goods sold for the first period is $1,729,385.81 and for the second period $1,582,330.75. Defendant's gross profit on total sales for the first period was $763,589.45 and for the second period was $1,080,929.90. The Master deducted from the gross profit 8.75 per cent of the General and Administrative and Selling expenses for the first period and 4.26 per cent for the second period. Defendant contends that all of Continental's General, etc., expenses should have been deducted before computing the profit on the Walnart business. Plaintiff contends the Master should not deduct any of these General expenses, because they represent pecuniary gain to defendant.

By the May 4, 1925, transaction defendant became trustee of Walnart. Schmitt v. Wright, 317 Ill. App. 384. In view of this fiduciary relationship, the decree of July

3, 1941, ruled that "the defendant should be charged with any profits made by them from the operation" of Walnart from May 4, 1925, to October 1, 1926. Defendant concedes this was construed in our previous opinion to mean whatever profits Continental made from sales of its products to Walnart. Schmitt v. Wright, 317 Ill. App. 384, 400. It made nothing from the sale of Walnart products. Since Continental books were not kept to show separately the exact profit it made on sales to Walnart, the Master was forced to take the company wide figures on sales, costs and expenses, and the amount of sales to Walnart and compute "any profits made by them (defendant) from the operation" (decree, 1941) of Walnart. The Master's method of computing this profit credits defendant with costs sustained by it in selling to Walnart. Continental controlled the Walnart Company; elected its Directors; and although plaintiff remained as president, defendant's Anderson dominated the operation of the business. Continental policies and influence were introduced. The deduction allowed defendant consists of that proportion of general expenses which sales to Walnart bear to total sales and a deduction of the actual cost of producing the products. We think this was equitable. The record does not show that the Master's method of computation overlooks any costs which trustee Continental sustained in furnishing its products to cestui que trust Walnart. We think the finding of the Master as to profits is not against the

manifest weight of the evidence.

For the reasons given the decree is affirmed.

DECREE AFFIRMED.

Lewe, P. J., and Burke, J., concur.

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44865

ANTHONY PADILLA, Appellant,	)	APPEAL FROM
v.	)	CIRCUIT COURT
JAMES WALKER, Appellee.	)	COOK COUNTY.

340 I.A. 222

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action with verdict and judgment in favor of defendant. Plaintiff has appealed.

Plaintiff was injured about 3:45 p.m. January 20, 1947, near the intersection of Kilpatrick Avenue and Kinzie Street, Chicago. His automobile was parked, facing north, north of the north line of Kinzie Street on the west side of Kilpatrick Avenue. A collision between his car and a milk truck occured. The truck thereupon backed east into Kinzie Street and plaintiff got out of his car to exchange information with the truck driver about the collision. He was standing near the rear of his car when a car driven by defendant struck him, pinned him between the bumpers of both cars, and injured him.

Plaintiff contends the verdict is against the manifest weight of evidence, that the Court erred on ruling on admissibility of evidence, and that reversible error occured in instructions to the jury. Defendant contends to the contrary and claims that in any event procedural errors are immaterial because plaintiff was guilty of contributory negligence as a matter of law. Nelson v. Armistead, 327 Ill. App. 184. Defendant's motion for a directed verdict at the close of all the evidence was denied.

Kilpatrick Avenue and Kinzie Street intersect at the same level just north of a Chicago & North Western Railroad viaduct over Kilpatrick Avenue. This intersection is below the level of the normal street grade of Kilpatrick Avenue which is depressed under the viaduct. There is, accordingly, an incline upward to the north on Kilpatrick Avenue north of the viaduct. Kilpatrick Avenue, moreover, is narrower north of the viaduct than it is beneath the viaduct. Its east curb north of Kinzie Street ~~being~~ is about six feet west of the east curb line beneath the viaduct. On the day of the accident there was not much snow or ice under the viaduct. The traffic northward from under the viaduct had made a "two wheel pattern" which turned slightly to the left at the start of the incline so as to allow for the change in the curb line. At the time of the accident visibility was not bad. There was ample room for passage of north bound cars to the west of plaintiff's car.

The testimony as to the condition of the streets at the time of the accident varies. In plaintiff's favor on the question, whether plaintiff was guilty of contributory negligence as a matter of law, we shall take the testimony that "there was no icy pavement. It was a slushy day. It wasn't icy at all"; that plaintiff was parked about a foot from the east curb of Kilpatrick Avenue and about twenty feet north of the north curb of Kinzie Street; and that, when struck, he was standing facing east in about the middle of the rear of his car exchanging information with the truck driver about the previous collision. We think that a reasonable man could infer from that testimony that plaintiff was not unreasonably exposing himself to danger and was

exercising due care. The question was therefore for the jury. None of the cases of Illinois or from foreign states cited as precedent compels a different conclusion.

The Court gave defendant's directory instruction #6 which told the jury that before plaintiff could recover, he was required to prove by greater weight of the evidence that defendant's negligence, if any, was the proximate cause of plaintiff's injury and that plaintiff's injury was not caused or contributed to by any want of ordinary care for his own safety. This instruction established a double standard of negligence and was therefore bad. Schmidt v. Anderson, 301 Ill. App. 28. The defect in this directory instruction was not cured by other instructions. In defendant's instruction #13 the jury was told about plaintiff's burden of proving defendant's guilt and then stated that "this rule as to the burden of proof is binding in law and must govern the jury in deciding this case." The quoted part of this instruction was condemned in Elmore v. Cummings, 321 Ill. App. 234, 241. The Supreme Court in Chicago Union Trac. Co. v. Mee, 218 Ill. 9, said that a refused instruction including the above quoted statement should have been given but pointed out however that no other instruction was given on the subject and the Court was unable to say that refusal to give the instruction was not prejudicial. The case of Johnson v. Chi. C'y. R'y. Co., 166 Ill. App. 79, 83 follows the Mee case. In the instant case there were other instructions on the burden of proof and we think the instruction merits the condemnation given in Elmore v. Cummings, 321 Ill. App. 234.

We see no objection to defendant's given instruction #16 because of the use of the word could instead of would. Kavanaugh v. Washburn, 320 Ill. App. 250, 253. Defendant's given instruction #17 told the jury that if it believed that defendant was a person of ordinary or reasonable skill and that he exercised the skill of a careful driver, it should find him not guilty. Defendant refers to Devine v. Brunswick-Balke Co., 270 Ill. 504, for approval of the instruction. There the Supreme Court was considering a similar instruction together with another instruction directly related. It said that the instruction similar to the instant instruction was proper standing alone but that the other should not have been given. We do not consider the Devine case as binding precedent for approval of the instruction in this case. There was no question made of the reasonableness of the skill of the defendant.

Defendant's given instruction #18 told the jury that a witness was impeachable by showing he had made different and contradictory statements on a material point on a prior occasion. Plaintiff argues that this instruction was erroneous because the only impeachment was on an immaterial point and furthermore that under The People v. Flynn, 378 Ill. 351, and Risch v. Consumers Petroleum Co. 321 Ill. App. 438, the giving of the instruction was reversible error. At the trial a witness for plaintiff testified that plaintiff's car was parked about a foot west of the east curb of Kilpatrick Avenue. Defendant, to impeach this witness, introduced in evidence a statement in writing signed

by the witness shortly after the accident in which he said that plaintiff was double parked. There are other instructions defining the issues so that there is a reference for the term "material", Schneiderman v. Interstate Transit Lines, 401 Ill. 172. We think the point to which the impeaching document was directed was sufficiently material so that the instruction could not have misled the jury. Furthermore a defense witness testified to contradictory oral statements previously given by another of plaintiff's witnesses on material points.

Defendant's given instruction #19 contained an ordinance of the City of Chicago prohibiting the parking of vehicles except within twelve inches of the edge of the road then told the jury that if the curbside wheels of plaintiff's car were more than twelve inches from the curb, etc. and this violation was negligence proximately contributing to cause the accident, the jury should find the defendant not guilty. The testimony of the distance between the curb and the wheels of plaintiff's car ranges from about a foot to about three feet. Plaintiff was standing about the middle of the rear bumper. We think therefore that there was no proximate relation between the distance of the wheels of the car from the curb and plaintiff's injury. We conclude that the ordinance was not relevant and the instruction was highly prejudicial.

The Court gave nine instructions for plaintiff and thirteen for defendant. Seven of defendants instructions either concluded with, or contained, the phrase you should find the defendant not guilty or words of similar meaning.

The only case in which this repetitious practice caused a reversal was Gulich v. Ewing, 318 Ill. App. 506. There and in Wrigley v. Standard Roofing Co., 325 Ill. App. 210, there were no defense witnesses. We fail to see that there was any prejudice to the plaintiff from the repetition of the phrases referred to. Neither do we see any prejudice in the instructions which covered contributory negligence merely because of the number given on that point.

Complaint is made that the Court committed error in refusing to permit plaintiff to testify to an arrangement made to pay for his medical bills. In cross-examining the plaintiff, defendant's attorney made considerable point of plaintiff having paid nothing on his doctor bills. For this reason we think on re-direct plaintiff should have been permitted to remove any suggestion that the bills were not bona fide. In view of what we have said about the immateriality of the distance of the wheels from the curb, we see no error of the Court refusing to permit plaintiff to testify concerning the exact location of the wheels or in the limiting of the examination of plaintiff's wife on the same subject. There was no error in refusing to admit the unpaid doctor bill after the physician had already testified to his charges. The witness Cesario testified about the distance of the car from the curb and the only objection to the introduction of the impeaching document was that he did not sign it, we see no error in the cross-examination and attempted impeachment of the witness. There was no error in the Court's ruling on objections made to the questions asked of an investigator.

A proper foundation was laid for the testimony of the investigator who gave testimony intended to impeach witness Giaocomelli. The trial Court permitted defendant's attorney to read to the jury the parking ordinance we have already referred to. This was prejudicial error. The ordinance was not materially related to the plaintiff's injury.

For prejudicial errors in the giving of instructions and permitting the reading of the ordinance to the jury, the judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

LEWE, P.J. AND BURKE, J. CONCUR.

44953

IRENE DARWIN,

Appellee,

v.

CHICAGO TRANSIT AUTHORITY, a Municipal Corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

340 I.A. 223

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action with verdict and judgment for plaintiff in the amount of $5,000.00. The jury disagreed at a previous trial. Defendant has appealed from the judgment.

Plaintiff was a passenger on defendant's west bound Belmont Avenue street car on February 22, 1946. She was injured when she fell to the floor of the front platform from the higher level of the inside of the street car. In her complaint plaintiff alleged due care; defendant's negligence in one or more of the following acts, operation of the car, its operation in a jerky manner, and the application of brakes in a sudden manner; and her consequent injury. Defendant made issue of these allegations.

Defendant contends we should reverse the judgment because the verdict is against the manifest weight of the evidence; that it was prejudiced through refusal of the trial Court to give defendant an opportunity to call a doctor as an impeaching witness; and in refusing to give an interrogatory and in giving an instruction.

Plaintiff testified that she was standing inside the car as it approached Cicero Avenue; that the car gave a "terrific jerk" which caused her to lose balance; that she held onto a bar across the window next to the exit door at the front of the car with her left hand; and that it gave a second jerk which tore her hand loose and threw her to the floor of the platform. She said the first jerk occurred about the middle of the block east of Cicero Avenue and the second jerk a few seconds later when the car was "about the length of two buildings or something like that or the width of two buildings from Cicero"; and that she was thrown so that her head hit something and that she did not fall on her knees. Mrs. Sajewski testified for plaintiff at both trials. She said she was on the front platform with her son standing at the door from which passengers alighted; that as the car approached Cicero Avenue "it took a terrible jerk" which almost made her fall and she grabbed the iron railing around the motorman; that her boy stumbled toward her; that a couple of seconds later there was another "terrific jerk"; that "about the time of these two jerks", she heard a loud scream; and that she looked about and saw plaintiff lying on the platform. This witness did not see plaintiff fall but said she heard the scream before the car stopped and that the second jerk occured "about the length of a safety island" from Cicero Avenue.

An employee of defendant for forty years was a passenger on the street car and was standing on the front platform facing forward. He testified that the car was brought to

a stop in an ordinary manner; and that the car had been stopped for forty or forty-five seconds, and about three people had alighted when plaintiff "come flying out" of the inside of the car, fell on her knees, and helped herself to her feet by using the motorman's rail. Another employee of defendant for thirty-five and one-half years was a passenger on the car standing on the inside of the car against the front door on the south side facing the rear. He noticed nothing unusual about the stop and after the stop, heard a commotion, looked around, saw plaintiff on her knees on the platform with the motorman assisting her to rise; and that plaintiff was on her knees about twenty seconds. The motorman said he cut off the power about 150 feet east of Cicero Avenue, gave two applications of air, and brought the car to a smooth stop; and that after the car stopped, he opened the front door, four or five people alighted, he heard a commotion, saw plaintiff in a kneeling position on the platform. He helped her up and she said she had a bump on her head and [illegible] was holding her hand on the back of her head. The conductor testified that all the stops on the run were "nice smooth, ordinary stops" and that he noticed nothing unusual until he saw the motorman talking with the plaintiff at the curb. A young lady testified for defendant that, as the car neared Cicero Avenue, plaintiff was conversing gaily with a man; that when she started out of the car, she turned to say something to the man; that the car was standing still at the time; and that as plaintiff turned, she tripped, fell to the platform "very fast and came up very fast" being on the floor about three seconds.

The record does not show that the verdict is against the manifest weight of the evidence. In Reinowski v. Richardson, 279 Ill. App. 633, cited by defendant, the Court pointed out that the physical facts made it difficult to believe plaintiff's uncorroborated testimony. Defendant here makes several references to the interest of plaintiff in the outcome of the suit by way of detracting from the credit to be given her testimony. The jury had a right to consider her interest and the fact that four of defendant's five witnesses were its employees and to consider whatever impeaching testimony of plaintiff's corroborating witness was offered. A similar counter-interest was subject of comment in the Reinowski case.

We think that the verdict is not excessive. The judgment was for $5,000.00. The medical testimony was that plaintiff had a swelling and discoloration above her left ear and a swelling and discoloration toward the end of her spinal column; that her left thigh and left leg were discolored; that her physician diagnosed her injury as a cerebral concussion, nervous shock, and traumatic injury to the lower end of the spine and thigh and leg. She was treated daily at home for a week. She returned to work February 25, 1946, and except for about five and one-half days, worked thereafter until September 1, when she took a leave of absence until April 1947. She worked thereafter occasionally as needed until she resumed regular employment about the first of March 1948. She lost about $3,000.00 through loss of wages and had a medical bill of about $200.00. She suffered

from headaches until about the time of the trial and suffered from dizziness following the accident and had frequent fainting spells. She suffered from back pain and after the accident was compelled to wear a special steel-staved corset covering the sacroiliac region. There was no counter medical testimony on behalf of defendant. There was no evidence that her injuries or suffering were attributable to an operation plaintiff previously had and not to the accident. The case of Allison v. C. T. A., 336 Ill. App. 224, is not applicable.

Just before the court adjourned at noon on March 22, 1949, plaintiff's medical witness testified that plaintiff, during the year before the accident, underwent a hysterectomy. Plaintiff testified that the operation was for a "cyst or something that I had" and "for some female trouble." At the morning session on March 23rd defendant offered Chief Medical Record Librarian of the University of Chicago Clinic to testify to the contents of the hospital record of plaintiff's operation. After this witness identified the record, plaintiff was recalled for cross-examination and said she did not tell as part of her medical history at the hospital that she suffered fainting spells since childhood or pain of the left loin. Defendant's witness was then recalled, and identified the handwriting on the record as that of Dr. Kenyard. She was not permitted to testify of its contents but did say plaintiff had been admitted to the hospital for a hysterectomy. No point is made that the Court erred in rejecting this witness' testimony of what the hospital record contained. Defendant's attorney asked whether he could have until 2:00 o'clock to "attempt to have the Doctor in." The Court refused permission. No effort was made

44952

DAN H. BROWN,
Appellant,

v.

GEORGE W. BAYLESS and MATTIE BAYLESS, doing business under the name and style of GREENWOOD INN,
Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

340 I.A. 223[2]

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order of the Superior Court sustaining defendants' motion to strike the amended complaint and dismissing the suit at plaintiff's cost.

The pertinent portion of the amended complaint alleged that plaintiff had for some years been a tenant at the Greenwood Inn in Evanston, a boarding and rooming house owned and operated by defendants; that in February 1948 he secured permission from the management to have his minor son live with him in his apartment, which was on the third floor of the inn; that due to certain fire hazards he was anxious to secure an apartment on the first floor for himself and his son, and made a request to that end; that defendants promised they "would obtain a two-room apartment on the first floor"; that in consideration of defendants' promise, plaintiff paid them the sum of $1000.00 in advance, which was to apply on his rental as it became due, and more especially on a first floor apartment; and that although defendants had vacancies on the first floor, they violated their agreement with plaintiff and rented the apartments to other persons; by reason whereof he suffered damages in the sum of $5000.00. Attached to the amended

complaint was a statement or receipt showing the payment of $1000.00. On oral argument counsel for both parties agreed that since the payment of $1000.00 was made, plaintiff has been credited with the full amount of such payment on rentals for the apartment that he was occupying.

One of the reasons assigned in support of the motion to strike the amended complaint was that it did not allege sufficient facts to constitute a cause of action against defendants. We hold with this contention. The allegations with respect to vacancies on the first floor of the inn do not identify or point out any apartments that were available and would have been suitable for plaintiff, or the dates on which they became available, or the rental to be paid therefor, as well as other pertinent facts necessary to a valid contract. Also, there are no allegations from which any measure of damages could be ascertained or computed. It would be unreasonable to require defendants to stand trial on the charges made in the amended complaint.

In the view we take, a discussion of the contention by defendants that the oral agreement was a violation of the Statute of Frauds (Ill. Rev. Stat. 1949, ch. 59, sec. 1) becomes unnecessary.

The order of the Superior Court sustaining the motion to strike the amended complaint and dismissing the suit is therefore affirmed.

Order affirmed.

Scanlan and Schwartz, JJ., concur.

44870

IN THE MATTER OF THE PETITION OF WARREN A. DODT and RUTH GENEVIEVE DODT TO ADOPT CRAIG BRUCE WERNER, Appellees,	)	APPEAL FROM
	)	COUNTY COURT,
	)	COOK COUNTY.
v.	)	
PAUL D. WERNER, Respondent-Appellant.	)	

340 I.A. 224

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Motion of appellees to dismiss the appeal is denied.

This is an appeal by defendant from a decree of adoption entered by the County court of Cook county on the petition of Warren A. Dodt and Ruth Genevieve Dodt to adopt Craig Bruce Werner. Craig Bruce Werner is the child of petitioner, Ruth Genevieve Dodt, and the defendant. They were divorced in December, 1945. The child was born in June 1946, and Ruth Genevieve Dodt married Warren A. Dodt on August 4, 1946. Defendant, although able to do so and often asked by petitioners with whom the child lived, did not contribute to the support of his child. During the two and one-half years prior to the time of the hearing of the case, defendant had made one contribution of $10 to the child's support. Defendant had visited the child once a month since its birth, and after the filing of the adoption petition, once a week.

The case was well tried in the lower court, and

at its conclusion, the court made the following comment: "In a hearing of this kind, the prime concern of the court is the welfare of the child. While a father has a right to the love and affection of his child, the right of the child to the feeling of security and of belonging to one family and unit is in the mind of this court superior to the right of the father, especially when the father has sought only his right and has not fulfilled his obligations." With these wise and understanding comments of the trial court we are in complete accord. During oral argument, however, both lawyers made statements to us which indicate that events have occurred since the entry of the decree which have some bearing on the question of the stability of the existing family unit. Ordinarily, we would not pay attention to statements made de hors the record, but in a case of this kind, we deem it important in the interest of the child that they should be noted.

Complaint is made by the defendant that in the examination of the petitioner, Warren A. Dodt, the trial court erred in sustaining the objection as to the type of medical discharge given to Warren A. Dodt eleven months after his entering the service. In an adoption proceeding, where the question is the welfare of a child, considerable liberality should be allowed in inquiring into the fitness and character of the petitioners. It is our opinion that this was a proper line of inquiry and that the objection to it should not have been sustained.

Reversed and Remanded.

Friend, P. J., and Scanlan, J., concur.

Abstract

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

FEBRUARY TERM, A. D. 1950

General No. 9660 Agenda No. 2

340 I.A. 277

Frank Check, et al.,
Plaintiffs,
vs.
Cassandra Sue White, et al.,
Defendants.
# # # # # # #
Warren White,
Appellant,
vs.
Frank Check, Olive Jones Check and Cassandra Sue White, a minor, and Frank Stewart White, a minor, by Robert F. Scott, their guardian ad litem,
Appellees.

Appeal from County Court of Sangamon County.

Wheat, P. J.

This is an appeal from an order awarding to Frank Check and Olive Check, petitioners-appellees, the adoption of Cassandra Sue White and Frank Stewart White, who are minor children of Warren White, defendant-appellant, their natural father.

Warren White and his wife were divorced in August, 1942, in which proceeding, by default, she was awarded custody of the children and he was ordered to pay support money. The decree did not find that he was unfit to have the custody of the children. He paid the support money until the death of his wife July 29, 1947. On August 25, 1947, the parents of the deceased wife filed this

adoption petition alleging abandonment by the father, Warren White.

This is a type of case of which the courts have had too many, so much so that it might be called a "pattern case". The issues involve the weighing of human sympathy for maternal grandparents who substantially rear young children, as against the legal rights of a father to have custody of his children, which by many decisions over the years have been rigidly established, each case, of course, being tested by a consideration as to the best interests of the children involved.

The only issue presented is as to whether or not the father abandoned the children. There is conflicting testimony as to his visitation with his children, and his attempts at visitation, but it is clear he made some efforts, and refrained from further efforts at the request of his former wife because she stated it made the situation more difficult for her. It is admitted that he made payments for their support regularly up to the time of his former wife's death and that the adoption proceedings were started within a month thereafter. In the case of In re Petition of Ekendahl v. Topol, 321 Ill.App.457, the court stated:

> "Abandonment imports any conduct on the part of the parent which evinces a settled purpose of foregoing of parental duties and relinquishment of parental claims to the child" and that "the idea of relinquishment appears universal in defining the term."

In the case of Hill v. Allabaugh, 333 Ill.App.602, involving an adoption proceeding based on the charge of abandonment the court stated:

> "The question of the right of adoption is easily distinguishable from the right to custody, and any court of chancery has jurisdiction to take from the parent the custody of his child in case he or she is found unfit to have it. Custody is one thing; adoption is another. Adoption which changes the course of inheritance, deprives the child of the place in which it was placed by nature, and by force of law, thrusts the child into another relationship, is a very different matter from change of custody.*** A parent has a right to his child against all the world unless he has forfeited that right according to law, or the welfare of the child demands that he be deprived of

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it,*** and the rights of a natural parent will not be disturbed unless petitioners make out a case by clear and satisfactory evidence."

It was also held in the case of People ex rel. Frentz v. Frentz, 256 Ill.App.259 that an allegation in an adoption petition that the natural father "had contributed only a very small amount" towards the support of the child negatived the contention of abandonment.

The Court is of the opinion that the evidence in this case does not show, as a matter of law, that the father has been guilty of abandonment of his children. No attempt has been made to show that he is an unfit person (except on the charge of abandonment). The evidence shows that he has since remarried, that both he and his wife desire custody of the children; his income is ample to support them. So far as can be prophesied from the circumstances shown, it appears that the best interests of the children will be served by permitting them to be taken into the home of their natural father and his present wife.

The cause is reversed and remanded to the County Court of Sangamon County with directions to deny the petition for adoption.

Reversed and remanded with directions.

44940

C. B. LAPHAM,
Appellee,

v.

BURROUGHS ADDING MACHINE COMPANY,
a Michigan corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

3[illegible] I.A. 2[illegible]8

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff filed suit May 2, 1942, upon a written contract of employment dated April 16, 1941, to recover commissions due him. Defendant filed a counterclaim alleging that under said contract it was entitled to surcharge plaintiff with debit balances due it from plaintiff under a series of previous contracts, and alleging that there was due to defendant, after giving plaintiff credit for all commissions earned, the sum of $5700. Plaintiff filed an answer to the counterclaim, alleging that all of defendant's counterclaim is barred by the Michigan Statute of Limitations, more than six years having elapsed between the accrual of said cause of action and the filing of the counterclaim. A hearing before the court, without a jury, resulted in a finding and judgment by the court that defendant's counterclaim was barred by the Michigan Statute of Limitations, and that plaintiff was entitled to recover the sum of $704.80, for which judgment was entered, and defendant appeals.

The pertinent provisions of the contract in question obligate defendant to pay plaintiff a salary of $50.00 per week plus 13% commission, provided, however, that "the total

amount of such salary and expenses paid during the term of this agreement, shall be offset by commission credits before compensation beyond the salary will be due and payble." Paragraph 12 of the contract, upon which defendant rests its counterclaim, provides:

> "That after cash advances against commissions and items chargeable to him since March 10, 1941 have been earned, 50% of net commission earnings in excess of $365.00 in any month may be retained by the Company (the remainder being due the Salesman) until a sufficient amount has been accumulated,
>
> (a) to establish a Fixed Reserve in accordance with the 'Decisions in Force';
>
> (b) to liquidate any debit balance or other indebtedness under this or any former contract or otherwise owing by the Salesman to the Company or to any Branch Manager;
>
> and that any amounts so retained may not be used in computing future earnings settlements; provided, however, that the Company may, in its discretion, withhold at any time the payment of any commissions until an adequate Fixed Reserve has been established, until all customers' accounts in respect of which the Salesman claims commissions have been paid in full and until the debit balances or other indebtedness mentioned above have been liquidated."

The trial court found there was in the reserve fund provided for in paragraph 12 the sum of $704.80. Defendant claims that under paragraph 12 of the contract, it was entitled to recover alleged debit balances due from plaintiff under previous contracts of employment dated October 1, 1929, October 13, 1930, January 31, 1931, January 28, 1932, September 13, 1932 and March 12, 1935. In the last dated contract there appeared a provision in paragraph 21-1/2, which recited that the debit balances resulting from operations under the preceding contracts mentioned, as shown by the salesman's account, should be

carried forward as a deficit and must be made up by the salesman in accordance with the provisions of paragraph 12. Paragraph 12 in the 1935 contract is substantially the same as that in the contract sued upon.

We are satisfied from a review of the record that the counterclaim is barred by the Michigan Statute of Limitations, unless paragraph 12 of the contract sued upon is such a promise as revived the alleged debt barred by the Michigan Statute of Limitations. A careful reading of the paragraph in question makes it clear to us that there was no definite acknowledgment of a specific indebtedness, nor is any promise to pay a definite indebtedness deducible from the language. In Keener v. Crull, 19 Ill. 189, the court said:

> "The new promise may arise out of such facts as identify the debt, the subject of the promise, with such certainty as will clearly determine its character, fix the amount due, and show a present unqualified willingness and intention to pay it." (Italics ours.)

Waldron v. Alexander, 136 Ill. 550, 562, restated the same rule of law. This court followed that rule in Nonotuck Silk Co. v. Pritzker, 143 Ill. App. 644, 652, and see cases there cited. The language of paragraph 12, section (b), merely authorizes defendant to liquidate any previous debit balance due from plaintiff, though not fixed, determined or described in the contract, out of any reserve retained by defendant from commissions earned by plaintiff under the contract sued upon. It is not, therefore, such a promise or acknowledgement of an indebtedness as would revive the debt barred by the Statute of Limitations under the rule laid down in the cases cited.

The amount in the reserve, for which judgment was entered, defendant had a right to apply to the alleged indebtedness of plaintiff under the prior contracts, under the clear authority granted by section (b) of said paragraph 12. We are also satisfied from a review of the evidence that there was more than the amount in the reserve due from plaintiff to the defendant under the prior contracts. The trial court was in error in giving plaintiff judgment for that amount.

Accordingly, the judgment for plaintiff is reversed, and the judgment against defendant on its counterclaim is affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

Nieneyer, J., concurs.

Tuohy, P. J., took no part.

44924

CATHERINE ROSE STULTZ SCHULTZ,
Appellee-Cross-Appellant,

v.

CHICAGO FLAT JANITORS UNION, LOCAL NO. 1, WILLIAM L. McFETRIDGE, GUS VAN HECK, CHARLES J. BURG, DUDLEY WATERS, PETER DU FOUR and JOHN LIESZ,
Appellants-Cross-Appellees.

APPEAL FROM
SUPERIOR COURT COOK COUNTY

340 I.A. 278

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a decree granting a permanent injunction restraining and enjoining them, their agents, employees and officers from preventing the delivery of coal and other commodities to the buildings of plaintiff described in the complaint, or from preventing pickups to be made therefrom, including the removal of ashes, garbage and refuse, or from molesting or preventing or interfering with painters, decorators or workmen from working on said premises or from molesting, harassing or interfering with the plaintiff from acting as janitor of said premises; provided, however, that said defendants, their agents, employees and officers may peacefully picket said premises and by the use of peaceful persuasion and without violence, force or intimidation of any kind, prevent such deliveries and such pickups. Plaintiff cross-appeals from the order of the court quashing the summons as to the defendant Union as to the counts at law seeking damages for alleged wrongful acts of defendants in picketing the premises of plaintiff and dismissing said counts as to said defendant.

Plaintiff filed a complaint for an injunction restraining defendants, a labor union and certain officers and members of the union, from picketing her premises and thereby preventing deliveries to and pickups from the premises. The cause was referred to a master, who heard the evidence and filed a report recommending the issuance of an injunction. Both parties filed objections to the report, which were permitted to stand as exceptions, all of which were overruled by the trial court and the decree entered, as stated above.

The evidence shows that plaintiff had for some time employed a union janitor; that she discharged him and refused to reinstate him or to employ another union man. She testified that after the discharge of the union janitor she personally performed all the services of a janitor of the two buildings owned by her. There is evidence in the record that certain services usually performed by janitors were in fact performed by persons other than plaintiff. Persons going to the building to deliver coal and remove ashes were accosted by the pickets and thereupon refused to deliver the coal or remove the ashes. The master makes no finding of force, violence, threats or intimidation by the pickets, and plaintiff objected to the master's report because of this failure. The only evidence in the record tending to support plaintiff's objection is the testimony of the driver of a coal truck, who said that the picket told him that "the coal should not be dumped there," or that "it was not advisable to have it dumped there," and, that this was said "in a more

or less deliberate manner. It was not peaceable." This witness and his helper testified that they would not deliver coal if they knew there was labor trouble. Upon the record there was a labor controversy between plaintiff and defendants as to whether or not plaintiff was employing nonunion persons in the performance of the work of a janitor on her premises. Defendants therefore could lawfully picket the premises, and in the absence of force, violence, threats or intimidation should not be restrained from so doing. The 2063 Lawrence Ave.Bldg. Corp. v. Van Heck, 377 Ill. 37. The court erred in granting the injunction.

Defendants also contend that the court erred in assessing against the defendants the sum of $526.50, which it found had been necessarily expended and paid out to court reporters by plaintiff. The statute relating to fees and salaries (Ill. Rev. Stat. 1949, chap. 53, par. 38) provides that "The court may also include as a part of such master's fees a reasonable allowance not to exceeed fifteen cents per hundred words for stenographer's services in cases where the master shall certify that a stenographer was necessarily employed, and shall attach to his report a certified copy of the testimony taken by such stenographer." Under this statute the expenses of a court reporter or stenographer can be allowed only as a part of the master's fees. In this case they were not allowed as such, but payment was directed to be made to plaintiff. A separate allowance of fees was made to the master. The amount directed to be paid by plaintiff was not based upon fifteen cents per hundred words of

testimony taken, but on affidavits of the court reporters attached to the transcript of testimony stating the number of pages of testimony taken by them and the hours spent in taking this testimony. There being no substantial compliance with the statute, the court erred in directing payment of this amount. Ellingsen v. Milk Wagon Drivers' Union 377 Ill. 76.

The defendant union filed a special appearance as to the counts at law for the purpose of moving to quash service as to the defendant and dismissing the counts at law as to said defendant. As heretofore stated, this motion was allowed. A voluntary association, such as a labor union, is not, in the absence of a statute, a legal entity in actions at law, and therefore cannot be sued as such. Montgomery Ward & Co. v. Franklin Union, 323 Ill. App. 590. We need not decide whether this inability to sue a labor union at law should be taken advantage of by motion to strike, as in Montgomery Ward & Co. v. Franklin Union, supra, or by motion to quash the summons, which was admittedly valid as to the count in equity, as was done in the instant case. The motion was treated as a motion to dismiss and was properly sustained.

The decree appealed from is reversed.

REVERSED.

Feinberg, J., concurs.
Tuohy, P. J., took no part.

General No. 10407 Agenda No. 11

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

- - -

FEBRUARY TERM, A.D. 1950

- - - 340 I.A. 279

DAN R. McGAUGHEY, Appellee, vs. CHICK JOHNSON, Appellant.	APPEAL FROM THE CIRCUIT COURT OF LAKE COUNTY.

Dove, J.

On January 10, 1944, Dan R. McGaughey filed his complaint in the Circuit Court of Lake County seeking to recover from Harold O. (Chick) Johnson a commission for services rendered by the plaintiff as a real estate broker in connection with the sale of a farm belonging to Johnson which was located on Day Road near Libertyville, Illinois. The defendant answered denying the material allegations of the complaint and particularly denying any contract of employment or that plaintiff was the procuring cause of the sale of the premises. The issues made by the pleadings were submitted to

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

- - -

FEBRUARY TERM, A.D. 1950

- - - 3 A.D.I.A. 279

DAN R. McCAUGHEY,	
Appellee,	
vs.	APPEAL FROM THE
CHICK JOHNSON,	CIRCUIT COURT OF
Appellant.	LAKE COUNTY.

Dove, J.

On January 10, 1944, Dan R. McCaughey filed his complaint in the Circuit Court of Lake County seeking to recover from Harold O. (Chick) Johnson a commission for services rendered by the plaintiff as a real estate broker in connection with the sale of a farm belonging to Johnson which was located on Dry Dock Road Libertyville, Illinois. The defendant answered denying the material allegations of the complaint and particularly denying any contract of employment or that plaintiff was the procuring cause of the sale of the premises. The issues made by the pleadings were submitted to

a jury, resulting in a verdict in favor of the plaintiff for $975.00. Upon this verdict judgment was rendered, and the defendant appeals.

The evidence discloses that for some time prior to July 15, 1943, appellant's property, consisting of ninety acres of land and well-improved, was vacant and for sale. Marion Jones lived near-by and had the keys to the property. Appellee is a real estate broker with an office in Libertyville. On July 15, 1943, he wrote appellant, who, at that time, was in New York City, calling his attention to the fact that he was a real estate broker and had shown appellant's property three times and had an offer of $16,000.00 therefor which Mr. Jones requested appellee to submit to appellant.

On July 20, 1943, Abraham Males wrote appellee, from his New York office, as follows: "Your letter of the 15th inst. addressed to Mr. Chic Johnson has been given to me for attention. Mr. Johnson is not inclined to entertain any offer for his farm premises at Libertyville of less than $20,000.00 cash, net to himself, no broker's commission. If you are interested please communicate with me." On July 22, 1943, appellee wired appellant: "Have contacted your attorney, Mr. A. Males. I have client, Mr. Berimgham, to buy your place at Libertyville. Please send keys to closet containing light fixtures to Marion Jones or myself." The following day appellee wrote Males that he had a client who was interested in the purchase of the property for $20,000.00, net to appellant, and that he would get his broker's commission over, provided the fixtures are in the closet that is locked; that if Males knew who had the

a jury, resulting in a verdict in favor of the plaintiff for $975.00. Upon this verdict judgment was rendered, and the defendant appeals.

The evidence discloses that for some time prior to July 15, 1943, appellant's property, consisting of ninety acres of land and well-improved, was vacant and for sale. Marion Jones lived near by and had the keys to the property. Appellee is a real estate broker with an office in Libertyville. On July 15, 1943, he wrote appellant, who, at that time, was in New York City, calling his attention to the fact that he was a real estate broker and had shown appellant's property three times and had an offer of $15,000.00 therefor which Mr. Jones requested appellee to submit to appellant.

On July 20, 1943, Abraham Males wrote appellee, from his New York offices, as follows: "Your letter of the 15th inst. addressed to Mr. Chic Johnson has been given to me for attention. Mr. Johnson is not inclined to entertain any offer for his farm premises at Libertyville of less than $20,000.00 cash, not to himself, no broker's commission. If you are interested please communicate with me." On July 22, 1943, appellee wired appellant: "Have contacted your attorney, Mr. A. Males. I have client, Mr. Bertram, to buy your place at Libertyville. Please send key to closest combination light fixtures to Marion Jones or myself." The following day appellee wrote Males that he had a client who was interested in the purchase of the property for $20,000.00, not to appellant\ provided the fixtures and that he would get his broker's commission over, are in the closest that is looked; that if Males knew who had the

key to the closet, appellee would appreciate having it forwarded to him, so he could give his client an opportunity to look them over, together with a view of how the attic is constructed; that he, appellee, understood from Jones that Mrs. Johnson had a key to this closet, and he had sent a message to/~~them~~ Mr. & Mrs. Johnson the day before. In this letter appellee also inquired whether the few articles of furniture left in the house would be included in the sale and concluded: "As it now appears, my client, Mr. Berimgham, is definitely interested and you can rest assured that I will do everything I can toward an early consumation of this transaction. I will be happy, indeed, to abide by your wishes in every way. Please let me hear from you soon in regard to the light fixtures as this is the only thing that stands in the way of making the deal."

According to the testimony of appellee, Mr. Males called appellee over the phone a day or two after this letter was mailed and, speaking from New York, said that he did not know where the keys to the closet were, but that if it was necessary, in order to show the property to appellee's client, that appellee could break down the closet door. In this conversation, Males inquired of appellee whether he had any prospective purchasers, and appellee named Mr. Berimgham, Mr. Gamboni, Mr. Benkert, Mr. Uska and W. W. Lee as prospective purchasers. Males asked if any of these prospective purchasers were "hot" and appellee replied that Berimgham had made an offer of $20,000.00 and that he also thought Benkert was interested. Males then inquired how much appellee's broker's

Mr. & Mrs. Johnson

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commission would be, and appellee told him five per cent, and Males then said "All right, go ahead and sell it" but that they definitely wanted $20,000.00 net, and that in order for appellee to get his five per cent commission, the purchaser would have to pay $21,000.00. Appellee further testified that in this telephone conversation he told Males that if Berimgham did not buy the property that he knew Benkert would, and Males then said that the property was for sale and for appellee to go ahead and sell it and used these words: "Okay, go ahead, the farm is yours to sell." Following this conversation, appellee secured a locksmith in Waukegan and they went to the farm and Jones admitted them and the closet door was opened.

Appellee further testified that the first time he went to the Johnson property was in February, 1943; that he went there with Marion Jones and at that time counted and measured the rooms of the dwelling, inspected the barns and outbuildings and looked over the land; that he showed the property five or six times and upon each time had to locate Mr. Jones and procure the key from him; that he had known Mr. Benkert for eight years and had tried to interest him in the purchase of other properties which he had listed for sale and had shown him these other properties; that about June 30, 1943, he saw Mr. Benkert and told him that he had found the farm Benkert was looking for and described the Johnson property and drew a plat of it for him, told him where it was located, how many of the ninety acres were under cultivation, informed him that the dwelling contained seventeen rooms and described them, and

dwelling contained seventeen rooms and described them, and the ninety acres were under cultivation, informed him that the place or it for sale, told him where it was located, how many of them were tenanted; that about June 20, 1913, he saw Mr. Gumbert and told him that he had taken the farm Gumbert other properties which he had listed for sale and had shown him eight years and had tried to interest him in the purchase of and procure the key from him; that he had known Mr. Gumbert for five or six times and upon each time had to locate Mr. Jones Building and looked over the land; that he showed the property and the rooms of the dwelling, inspected the barns and outwent there with Morton Jones and at that time counted and measure to the Johnson property was in February, 1913; that he admitted them and the door was opened.

close

Appellee further testified that the first time he saw the farm he was in Waukegan and they went to the farm the farm is young to sell." Following this conversation, appellee and Gumbert had a lunch in Waukegan and they went to the farm to sheed and sell it and deed sheep works: "Okay, go sheed, and told him that the property was for sale and for appellee to not buy the property that he knew Gumbert would, and Gumbert in this telephone conversation he told Helm that if Gringman would have to pay $11,000.00. Appellee further testified that appellee to get his five per cent commission, the purchaser they definitely wanted $30,000.00 net, and that in order for sales then said "All right, go ahead and sell it" but that commission would be, and appellee told him five per cent, and

called his attention to the fact that there was a three-car garage which had an apartment above it, and told him about the neighborhood and asked him to get in his car and go out with him and inspect the property. Mr. Benkert declined to go but told appellee that he and his wife would go out and see the property the following Sunday and appellee told him how to get there and that in order to inspect the house he should see Marion Jones and instructed Benkert to tell Jones that appellee sent him.

Shortly after the telephone conversation with Mr. Males, appellee testified that he again saw Mr. Benkert and told him that Jones had told appellee that Benkert had been over to see the Johnson place several times. Appellee informed Benkert that he had several prospects who were interested in the purchase of the place and that he thought he would be able to make a sale within the next few days. Benkert then informed appellee he had not had much luck with real estate men, and if he bought this property, he would buy it direct from the owner and on August 3, 1943, he did so for $19,500.00.

The evidence further discloses that for more than twenty years Abraham Males had been the attorney and business representative of appellant and was authorized by a general power of attorney from appellant to dispose of this farm and had complete charge of this transaction. Mr. Males testified that the first time he ever heard of appellee was when the letter of July 15, 1943, written by appellee to appellant, was referred to him for attention by appellant; that shortly after he received appellee's

letter of July 23, 1943, he called appellee over the telephone from his New York office and told him he did not know where the keys to the closet were but that whatever was in the closet did not go with the property; that they were selling the farm and not the personal property. Mr. Males further testified: "I discussed with him (appellee) the matter of a five per cent broker's commission but we wanted $20,000.00 clear, that $1,000.00 could be added to the $20,000.00 because Johnson wanted $20,000. I said to him, 'How much is your broker's commission?' and he replied, 'The usual five per cent.' I think I said that was agreeable and we would pay it but we wanted $20,000.00 clear, so he would have to get $21,000.00 for the property. I did not talk to him about anything other than getting in the closet and his commission. I called him in answer to his letter. I did not tell him that Mr. Benkert had been in touch with me. Benkert's name was not mentioned. I never said to him at that time or at any time anything like, 'Okay, the property is yours to sell'."

Edward A. Benkert testified that he became desirous of purchasing farm property in the latter part of 1942 or in the early part of 1943 and for that purpose went to the office of Louis Boehm, a real estate broker having an office at Grayslake and there saw appellee; that Mr. Boehm turned him over to appellee and he there talked to appellee who informed him of various properties which appellee desired him to see and subsequently appellee took him to the Hunter and Lawrence farms

which appellee had for sale. About the middle of June, Benkert met appellee at the Shubert Tavern, and appellee asked him whether he was still interested in the Lawrence place, and Benkert told him he was not as the price was too high. The Johnson farm was mentioned in this conversation only casually according to Benkert. Early in July, Benkert visited the Johnson place and on July 11, 1943, Benkert sent this wire to appellant: "Marion Jones showed me your place in Lake County. What is your lowest price all cash, no broker." To this message Mr. Males replied: "Johnson wants twenty thousand net for Libertyville farm, wire if interested." On July 16, 1943, Benkert wrote Males and, among other things, stated that it was his belief that the price of $20,000.00 was a little high. On July 17, Males replied to this letter and stated that appellant "would entertain an offer of $20,000.00 in cash net, no brokers" for the property, and on July 21, Benkert wired Males an offer of $16,000.00 to which Males promptly replied that appellant was not interested and that the minimum offer he would entertain would be $20 000.00, net cash. Other letters and messages were exchanged culminating in the sale of the property by appellant to appellee, on August 3, 1943, for $19,500.00 as before stated.

Mr. Benkert further testified that he had frequently passed the Johnson property from the road and, on a week day during the week immediately preceding Sunday, July 11, 1943, he met Percy Snow, a retired rural mail carrier, in front of Shubert's Tavern who asked him why he didn't get the Johnson place. Mr. Snow was unable to fix the date of this conversation but stated it was

in the spring or early summer or summer of 1943. His testimony was that Benkert said he was desirous of buying a farm and that Snow suggested he contact Johnson.

Margaret Hodgkins testified that in July, 1943, and for several years before that date she was employed in appellee's real estate office; that she was present when Mr. Males and appellee had their only telephone conversation in connection with the sale of the Johnson farm and that she heard portions of that conversation. She testified that, in this conversation, she heard appellee speak about the price of the Johnson farm, the rate of his broker's commission and heard appellee say to Mr. Males that Mr. Berimgham was a prospective purchaser and that he, appellee, had another good prospect by the name of Ed Benkert to whom he had shown other farms.

Counsel for appellant contend that the trial court erred in denying appellant's motion for a directed verdict and also his motion for judgment notwithstanding the verdict. Counsel insists that the evidence does not disclose that appellant ever employed appellee as his broker, or that appellee ever rendered any services leading to the consumation of the sale to Benkert and fails to show that appellee was the procuring cause of that sale. Counsel argue that anything appellee did prior to his conversation with Males on July 26 or 27 was not done at the request of appellant and, therefore, such services were voluntary and gratuitous. Counsel insist that inasmuch as appellee did not become a registered real estate broker until February 25, 1943, it was error for the court to admit in evidence anything which appellee

did prior to that date.

The evidence discloses that Mr. Males, representing appellant, told appellee, whom he knew was a real estate broker, that the owner of the property was anxious to sell. Mr. Males ascertained that his broker's commission would be five per cent and he stated that inasmuch as the owner wanted $20,000.00 net the property would have to be sold for $21,000.00, thereby fixing the sale price at $21,000.00.

In Hafner vs. Herron, 165 Ill. 242 it was held that a broker is not to be deprived of his commission because the owner negotiates the contract or voluntarily reduces the price of the property, and in Francisco vs. Coleman, 230 Ill. App. 465, 470 the court said: "Where an agent is employed to sell real estate for the owner and is instrumental in bringing the owner and buyer together and the owner then concludes the sale at a less price than the agent was authorized to sell for, the agent is entitled to compensation for his services."

The issues presented by the pleadings were whether appellee was employed to sell this property upon a five per cent commission basis; whether appellee produced Mr. Benkert as a prospective purchaser; and whether appellee was the procuring cause of the sale of the property to him. We think the evidence found in this record tended to prove that appellee acquainted Benkert with this property and that at appellee's suggestions Benkert inspected the property; that Males, representing appellant, was advised by appellee that Benkert was a prospective purchaser and that Males told appellee to go ahead and sell the farm; that thereafter appellee told Benkert of his conversation with Males and that Benkert then told appellee he was not interested in buying

the property but if he did he would deal directly with the owner; that at this time Benkert was negotiating with Males for its purchase and that Males had previously been advised by appellee that he, appellee, had interested Benkert in the purchase of this property.

The evidence discloses that during the latter part of 1942, appellee went on the property of appellant and familiarized himself with the dwelling and outbuildings. Counsel for appellant insist that the court erred in admitting this testimony because it appeared that appellee was not a registered real estate broker until February 25, 1943. In his letter of July 15, 1943 to appellant, appellee advised him of his acquaintanceship with this property, and we are unable to see where appellant's cause was prejudiced by the admission of this evidence.

There is no merit in appellant's contention that it was error to permit appellee to testify that Marion Jones was in a hospital at the time of the trial. It was proper to show that Mr. Jones was unable to be present and to account for his absence in order to rebut the testify, and [illegible] inference that his testimony might have been adverse to the plaintiff. [illegible]. Neither was it error to permit appellee to testify that the phrase "get my commission over" which he used in his letter to Mr. Males, under date of July 23, 1943, meant that the brokerage commission is added to the net price and that a broker, in such a case, would obtain his commission from the seller. Nor was it error for the court to sustain objections to the several messages which passed between

Benkert and appellant and Benkert and Males and which we have herein referred to. Mr. Benkert was permitted to testify fully and in detail as to his activities in dealing with appellant, and the evidence disclosed the time he had those several transactions with appellant, what they were, and the date and the terms of the contract entered into between appellant and Benkert.

The decisive question in this case is whether or not appellee produced Benkert as a purchaser of the Johnson farm. The jury heard the evidence and found that he was. We find no reversible error in the record and the verdict of the jury, approved by the judgment of the trial court will be affirmed.

Judgment affirmed.

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The decisive question in this case is whether or not appellee produced Benkert as a purchaser of the Johnson farm. The jury heard the evidence and found that he was. We find no reversible error in the record and the verdict of the jury, approved by the judgment of the trial court will be affirmed.

Judgment affirmed.

44908

LOUIS KANYA and ANNA KANYA, Appellees,

v.

MARY KNIFIC and ANNA SAROZ, Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

340 I.A. 336

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On February 23, 1949 plaintiffs brought forcible-detainer proceedings in the Municipal Court for possession of an apartment occupied by defendants in a two-flat building located at 1311 East 71st place in Chicago, on the ground that plaintiffs sought in good faith to recover possession of the premises for the immediate and personal use and occupancy by members of their immediate family, their sons Arthur and Walter Kanya. Defendants moved to strike plaintiffs' statement of claim on the ground of res adjudicata, setting up as a bar of the instant cause a former judgment entered in favor of the same defendants on November 8, 1948 in the Municipal Court in a forcible-detainer suit theretofore filed by the same plaintiffs on October 25, 1948 involving the same parties and issues. On trial of the instant cause the landlords' termination notice to quit was admitted into evidence over the objections of defendants because of its claimed insufficiency, and although some discussion arose between court and counsel as to the validity of the notice, that question was not decided. Pursuant to hearing, the court found in favor of plaintiffs, entered judgment for possession

in their favor and stayed the writ of restitution for 90 days, presumably on the ground that the suit had been brought in good faith to recover possession of the apartment for the immediate use and occupancy by members of plaintiffs' immediate family, their two sons. This appeal by defendants followed.

It appears from the evidence adduced upon the hearing of the instant suit that plaintiffs, together with their two sons, occupied the apartment on the first floor, consisting of four and one-half rooms. For sleeping purposes plaintiff and his wife occupied a bedroom, one son used a small areaway under the stairway as a bedroom, and the other son slept on a couch in the living room. One of the defendants was a niece of the plaintiffs, and together with the other defendant, both of whom were single, occupied the second apartment, consisting of five rooms.

Plaintiffs contend that Judge Quilici, before whom the first forcible-detainer proceeding was tried, decided the matter on the legal question as to the sufficiency of the 60-day notice, and that no evidence was heard. Defendants argue that Judge Quilici talked to plaintiff and her two sons for whom the premises are claimed to have been sought and who were present in court, and that the issue was decided upon the facts.

Anna Kanya, one of the plaintiffs, was interrogated as to what had occurred before Judge Quilici, and she testi-

fied in part as follows:

"Q. When you were in court tell the court who you wanted the premises for. A. We didn't get a chance to say anything. This is the fourth time in court. This is the first time I can speak. The Court: The first time? The Witness: Yes, we were shut up all the time, like criminals [evidently referring to the exclusion of witnesses from the courtroom on defendants' motion]. Mr. Auw [attorney for plaintiffs]. Q. What was the reason why you were in court? A. Well, we wanted our place for my boys and daughter. Mr. Be-hannesey [attorney for defendants]. I object. The Witness: For the two boys and my daughter. The Court: How far did the case get? The Witness: God knows, nobody else. The Court: Did you testify? The Witness: Not our side, we didn't get a chance. Mr. Be-hannesey talk, talk, and we were shooed out like a dog."

Counsel for defendants, who also participated in the first trial, advised the court that Judge Quilici on the first trial "questioned everybody present, talked to my clients, talked to the boys, to Mrs. Kanya." Mrs. Kanya denied that any such general interrogation had been made. It is impossible to determine from the record what evidence was heard or on what basis the case was decided, because we have no transcript or report of proceedings of the first trial.

Mr. Auw, who appeared for plaintiffs in the in-

stant suit, did not represent them in the hearing before Judge Quilici; Mr. Kiggins was their attorney, and defendants' counsel subpoenaed him at the second trial in support of the hearing of the motion to strike on the ground of a prior adjudication. Mr. Kiggins, however, did not appear, and no further effort was made to obtain his testimony.

Defendants' contention that the former adjudication operated as a bar to the instant proceeding is predicated upon the alleged identity of the parties and of the subject matter. Although the parties are undoubtedly the same, it is impossible to ascertain from the record whether the same issue was tried before Judge Quilici, who may have decided the case on the insufficiency of the notice or upon the evidence. In any event, it was incumbent upon defendants to establish the fact that the same issues had been presented to Judge Quilici. Defendants' counsel was handicapped in this regard by the absence of the attorney who tried the first case and who presumably might have been able to clarify the situation.

We think that the cause should be tried in an orderly manner and that defendants should have an opportunity to prove, if they can, by competent evidence, that the identity of subject matter in the two proceedings was the same. Accordingly the judgment of the Municipal Court is reversed and the cause is remanded for a new trial.

Judgment reversed and cause remanded for a new trial.

Scanlan and Schwartz, JJ., concur.

196 A

44819

IRA E. KEIM and MARSHALL M. BROCK,
Appellees,
v.
EUGENE S. NICHOLS,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

340 I.A. 337

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This suit was brought by Ira E. Keim and Marshall M. Brock, plaintiffs, against Eugene S. Nichols, defendant. Ira E. Keim sued to recover for damages to a motor truck and trailer owned by Keim while it was being operated by Marshall M. Brock, plaintiff, upon and along U. S. Highway 66 at or near the intersection of a certain public highway known as Wolf Road, in Cook county, Illinois, on December 16, 1946, when the said motor truck and trailer crashed into a Reo tractor and trailer of defendant while it was standing across the said highway unattended and unlit. Marshall M. Brock sued to recover damages for personal injuries sustained by him as the result of the collision. The jury returned verdicts in favor of both plaintiffs. In one they awarded Ira E. Keim $3,268.25 damages, and in the other they awarded Marshall M. Brock $2,000 damages. Motions of defendant for judgments notwithstanding the verdicts and for a new trial were overruled. Defendant appeals from the judgments entered upon the verdicts.

No point is made as to the pleadings.

With the exception of a contention that relates

solely to the sufficiency of the proof offered by plaintiff Keirn as to loss of use of his vehicle during the time it was being repaired, and that will later be considered, the sole contention raised by defendant is the following: "The plaintiff Brock was guilty of contributory negligence and plaintiffs are not entitled to recover from the defendant, and, therefore, the trial court erred in not allowing the defendant's peremptory motions or the motions for judgment notwithstanding the verdict; and said court also erred in entering the judgments in favor of the plaintiffs as said judgments are against the manifest weight of the evidence. The truck standing on the highway was not the proximate cause of the occurrence." The entire argument in support of this contention is based upon the theory that "the plaintiff Brock was guilty of contributory negligence as a matter of law." In the recent case of Roadruck v. Schultz, 333 Ill. App. 476, we stated (pp. 480, 481):

"'"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing

the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489." (Hunter v. Troup, 315 Ill. 293, 296, 297.)' (Rose v. City of Chicago, 317 Ill. App. 1, 12. See, also, Mahan v. Richardson, 284 Ill. App. 493, 495; Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 110; Wolever v. Curtiss Candy Co., 293 Ill. App. 586, 597; Olympia Fields Club v. Bankers Indem. Ins. Co., 325 Ill. App. 649, 656, 657; Panella v. Weil-McLain Co., 329 Ill. App. 240, Abst. Op., App. Den. by Supr. Ct., 393 Ill. 630.)

"* * *

"The foregoing rules also apply to the contention that the court erred in denying defendant's motion for judgment notwithstanding the verdict."

Adhering to the foregoing rules, we find evidence to support the following state of facts: About 4:15 or 4:30 o'clock on the morning of December 16, 1946, defendant's truck, consisting of a tractor and loaded trailer, was standing across and blocking the four lanes of Route 66 (Joliet Road) about a half block northeast of the intersection of that highway with Wolf Road in Lyons Township, Cook county. The night was dark, the road was unlighted, the temperature was below freezing, sleet was falling, and the roads were covered with ice. At the point in question Route 66 runs in a southwest-northeast direction, and the

longitudinal axis of defendant's trailer pointed southeast and perpendicular to the center line of the road. Defendant's tractor was in the northeast-bound lanes, facing somewhat toward the northeast. There were no lights burning on defendant's truck, nor were there any flares lighted in the vicinity of the truck. Just northeast of the point where defendant's truck was standing, there was a slight curve in Route 66 and there is a twenty degree slope down which southwest-bound traffic had to proceed before reaching the point where defendant's truck was standing. Joseph Horvath and Frank J. Campbell were driving a passenger car, with its headlights burning, and they were proceeding southwest on Route 66 at 20 to 30 miles an hour as their car came around the curve and over the crest of the "hill." They were not able to see defendant's truck until after they had passed the crest of the hill and were about 75 to 100 feet from it. The brakes of their car were immediately applied, but they did not arrest the car's forward motion on the icy slope, and their automobile collided with the rear of defendant's tractor, which was in the inner southwest-bound lane. Horvath and Campbell got out of their car and looked around to find the driver of the truck but they were unable to find him. About five minutes after they had alighted from their car they saw plaintiffs' truck coming down the hill in a southwesterly direction. They saw that any attempt to flag plaintiffs' truck would not prevent a collision

and they therefore got off the road. Plaintiff Brock testified that he was driving plaintiff Keim's truck and that he first saw defendant's truck when he was on the down-slope and about 75 to 100 feet from it; that defendant's truck was across the road, blocking the four-lane highway, and was facing southeast; that when he first saw defendant's truck he was driving at a speed of 10 to 12 miles an hour; that he immediately applied the brakes and tried to turn off the highway, but that his truck slid down the hill and into the left rear side of defendant's trailer, which was in the outer southwest-bound lane; that the radiator and hood of plaintiff Keim's tractor were jammed under defendant's trailer; that he was conscious and pried himself loose, got out of the truck, and then saw Horvath and Campbell; that he gave them flares to put up around the scene of the collision and at the top of the hill; that they placed the flares up and down the hill and put kerosene flares behind and in front of the trailer; that the driver of defendant's truck first appeared upon the scene of the collision about thirty minutes after it occurred; that the police arrived at the scene prior to the arrival of defendant's driver. Defendant's counsel, able and experienced in the trial of personal injury cases, have not seen fit to adhere to the settled rules that govern us in passing upon defendant's contention. They single out testimony they deem most favorable to their contention that plaintiff Brock was guilty of contributory negligence as a

matter of law; they call attention to alleged contradictory evidence; they argue as to the weight of evidence; claim that Brock's memory was bad, and insist that he was impeached by a statement he signed sometime prior to the trial. By the very nature of their argument counsel concede, in effect, that their argument in support of their contention fails when tested by the established rules.

In Blumb v. Getz, 366 Ill. 273, the court states (p. 277):

"* * * The question of contributory negligence is one which is preeminently a fact for the consideration of a jury. It cannot be defined in exact terms and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of a jury which is provided for the purpose of deciding this as well as the other questions in the case. As was stated in Thomas v. Buchanan, 357 Ill. 270: 'The question of due care on the part of the plaintiff's intestate is always a question of fact to be submitted to a jury whenever there is any evidence in the record which, with any legitimate inference that may reasonably and legally be drawn therefrom, tends to show the exercise of due care on the part of the deceased.'"

In Moran v. Gatz, 390 Ill. 478, the court quoted with approval the rule stated in Blumb v. Getz, supra.

In Thomas v. Buchanan, 357 Ill. 270, cited in

Blumb v. Getz, supra, the court further stated (p. 277):

"* * * Contributory negligence becomes a question of law only when it can properly be said that all reasonable minds would reach the conclusion, under the facts stated, that such facts did not establish due care and caution on the part of the person charged therewith. Chicago and Eastern Illinois Railroad Co. v. Crose, 214 Ill. 602; Morrison v. Flowers, 308 id. 189."

Plaintiffs alleged in their complaint and claimed upon the trial that defendant's driver was negligent in violating his statutory duty to display lamps on his truck (which was blocking a highway unlighted) at a time between sunset and sunrise, contrary to Sec. 202, Ch. 95 1/2, Ill. Rev. Stat. 1945; and they also alleged and claimed upon the trial that he was grossly negligent in violating the requirement of Sec. 218, Ch. 95 1/2, that he cause to be lighted and placed on the highway flares to warn other vehicles of the presence of his disabled truck on the highway. In passing upon the contention of defendant, the violation of the two Sections by defendant's driver must be considered in determining whether plaintiff Brock was guilty of contributory negligence as a matter of law. Brock was proceeding upon a State highway and he had the right to assume, especially in view of the weather conditions that prevailed, that a driver upon the highway would not abandon his disabled truck,

leave it blocking the highway without lights, and that he would not fail to place upon the highway lighted flares to warn other vehicles of the presence of his disabled vehicle upon the highway. We are satisfied that the trial court was fully justified in refusing to hold that plaintiff Brock was guilty of contributory negligence as a matter of law. Indeed, any argument that all reasonable minds would reach the conclusion under the facts we have stated that Brock was guilty of contributory negligence would be, in our judgment, devoid of merit. In view of the facts of this case, we do not deem it necessary to analyze cases cited by plaintiff and defendant upon the instant contention.

It will be noted that Point I states that "said judgments are against the manifest weight of the evidence," but in defendant's argument in support of the point it is nowhere mentioned that the judgments are against the manifest weight of the evidence, so that we may assume that the said statement is abandoned. Counsel finally realized, apparently, that a contention that a verdict is against the manifest weight of the evidence assumes that plaintiff made out a prima facie case, and that such a contention, if argued, would nullify the contention that plaintiff's driver was guilty of contributory negligence as a matter of law.

The only other point raised by defendant is that plaintiff Keim failed to make proper proof as to loss of

use of his vehicle during the time it was being repaired. This point relates solely to plaintiff Keim's suit for damages to his tractor. It is difficult to believe that the instant point is seriously made. Defendant makes no point in his brief that the damages awarded are excessive and, therefore, we fail to see any materiality in the point. In defendant's "Errors Relied Upon for Reversal" the instant point is not mentioned. Defendant argues that Keim's repair bill amounted to $2,148.25 and the judgment in his favor was for $3,268.25, and "so presumably the difference between said sum and the amount of the repair bill was to compensate him for the loss of the use of the tractor during the time it was being repaired," and that "we submit that no adequate proof was offered to support said plaintiff's claim for loss of use of his tractor," while it was being repaired. Plaintiff Keim testified that he got the tractor back in ten weeks; that it was ten weeks before his truck was on the road again. Ryan, a witness for plaintiff Keim, testified that the rental price of a tractor in 1946 and 1947 was $16 a day without a driver. Plaintiff offered proof as to the damages to the tractor and George A. Botava, an expert, testified as to the time that it would reasonably take to make the repairs. He stated that it would take anywhere from eight to ten weeks to make them. Defendant offered no evidence to rebut plaintiff's testimony. We find no substantial merit in the instant contention.

This case seems to have been well tried. The experienced, able attorneys for defendant are unable to find in the record any errors of the kind usually assigned in personal injury cases.

The judgments of the Superior court of Cook county entered December 9, 1948, are affirmed in toto.

JUDGMENTS AFFIRMED IN TOTO.

Friend, P. J., and Schwartz, J., concur.

44658

HARRY McMAHON, Appellee,	)	
	)	APPEAL FROM SUPERIOR
v.	)	COURT, COOK COUNTY.
FRANK OPATKIEWICZ, Appellant.	)	

340 I.A. 337

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $5,000 for personal injuries sustained by plaintiff, a pedestrian struck by an automobile driven by defendant at State and Harrison streets, in Chicago, on January 17, 1947. Negligence and contributory negligence were the issues involved. The case was tried by trial lawyers of experience and recognized ability and heard by a judge who as a lawyer had special experience in such matters. If, under such auspices, issues as simple as those involved in this case cannot be tried without error, then we must recognize what every experienced judge and trial lawyer knows, that no jury trial is completely free of error, and the question for the reviewing court is always whether there was reversible error.

No point is made on the sufficiency of the evidence. Errors are assigned on rulings of the court with respect to evidence and instructions.

The first point made is that the court improperly refused to order a medical witness to give defendant's counsel a memorandum which the witness was using to refresh his recollection. Two Illinois cases are cited by appellant on this point. One is the criminal case of People v. Cassidy,

283 Ill. 398, in which the court held as error a refusal to permit defendant to testify from a memorandum for the purpose of refreshing his recollection. In so ruling, the court added that if the memorandum had been used for that purpose, counsel for the state should have been given an opportunity to examine it for the purpose of cross -examination. The case is obviously not authority for the proposition that this is reversible error.

In Harman v. Illinois & Eastern Coal Co., 237 Ill. 36, the other Illinois case cited by defendant, the witness, to refresh his recollection on that question, used certain sheets of paper showing amounts of coal mined, and testified therefrom, but the court denied opposing counsel the right to see those sheets. The court held, "For that purpose he was entitled to have possession of these sheets and to examine them, in order that he might conduct the cross-examination of the witness with intelligence. * * * No other witness testified who pretended to have personal knowledge of the amount of the output of the mine or of the number of days during which the mine was closed. * * *" This last sentence explains the importance which the court attached to the ruling in that case and the reason why it was the basis for reversal.

Dr. Jacobson testified that he was the attending physician, and had treated plaintiff from the inception of his injuries, January 17, 1947, to February 24, 1948. The memorandum in question related to the examination of February 24, 1948. Counsel cross-examined the doctor fully as to

plaintiff's injury. The nature of the injuries and treatment were testified to from his independent recollection and from numerous x-rays introduced in evidence. The x-rays were examined and interpreted at great length by doctors for both defendant and plaintiff.

Defendant does not contend that the damages are excessive. He merely argues that perhaps if he had been allowed to look at the memorandum, he might have found something on which to impeach or discredit the doctor's testimony. Dr. Jacobson is a graduate of the University of Wisconsin and Rush Medical College, has practiced in Illinois for 25 years, and has been on the staff of St. Luke's Hospital, one of the leading hospitals of Chicago, for 23 years. He is a fellow of the American College of Surgeons and a member of many other outstanding medical societies. It seems clear to us from a reading of the transcript of the record that his objection to counsel's use of the notes was not based on a desire to conceal, but on some sensitivity about exhibiting his personal notes, not uncommon among doctors. X-rays revealing the condition of plaintiff's leg formed the principal basis for both direct and cross-examination of the witness. In the Harman case, supra, there was no other evidence as to the relevant facts necessary to be proven. Dr. Jacobson showed no reluctance to testify. So far as appears from the record, he answered questions with candor and fairness. We do not feel that denial of counsel's request to use the

memorandum in question for the purpose of cross-examination was reversible error.

The second point made by defendant relates to the testimony by the doctor that plaintiff came into his office on February 24, 1948, limping. This, defendant says, was a subjective symptom to which the doctor could not testify because the examination in question was made ten days before trial and was therefore for the purpose of testifying at the trial, and not for the purpose of treatment. If the party was examined for the purpose of treatment by an attending physician, the testimony was proper. (West Chicago Street R. R. Co. v. Carr, 170 Ill. 478; Greinke v. Chicago City Ry. Co., 234 Ill. 564; and Shaughnessy v. Holt, 236 Ill. 485.) Dr. Jacobson testified as the plaintiff's attending physician. He testified that plaintiff favored his left leg at the time of this examination (February 24, 1948); that this condition had been present throughout the course of his treatment; and that he did not make this examination for the purpose of testifying. Under such circumstances, the testimony was proper.

Defendant complains of the court's ruling sustaining an objection to the question asked Dr. Conley, whether from his examination of the x-rays exclusively, he had an opinion as to whether there was any condition "which would cause the man to limp." The doctor then testified, in answer to a question, that the x-rays revealed that the fracture was "quite well healed." He was then asked: "Q. Is there anything in the condition that

you see in the healing which would cause the person, or might cause, or would be a sufficient cause for the person who had that condition, to limp?" An objection to that question was sustained and the court advised counsel that he could question the doctor as to whether he saw any limitation of motion in the x-rays. This he did, and the doctor replied quite fully.

Defendant complains that plaintiff's witness, Dr. Jacobson, was permitted to testify from x-rays that he observed a condition which would cause pain. An examination of Dr. Jacobson's testimony reveals that he gave a detailed description of what he saw in the x-rays, such as depressions, rough surfaces, calcification and callous piled up around the site of the fracture on the joint surface, which he said, causes a "painful joint." Under proper questioning, Dr. Conley would, no doubt, have been permitted to testify in like manner. However, it is apparent from Dr. Conley's testimony that he gave the court and jury his full interpretation of what he saw in the x-rays, and little could have been added by his answers to the questions objected to.

Defendant complains of the giving of instructions Nos. 8 and 10 on behalf of plaintiff. Seven instructions were offered on behalf of plaintiff and thirteen on behalf of defendant in this simple personal injury case. Defendant in his reply brief has withdrawn his objection to instruction No. 8. Instruction No. 10 sets forth the ordinance with respect to pedestrians crossing on traffic

signals. Defendant argues much about what the jury might understand from an instruction of this sort. The fact is that what it discloses is common knowledge. Moreover, instructions No. 11 and 12, given on behalf of defendant on this subject, repeat the words of the statute and fully inform the jury of the law pertaining to this phase of the case. If we assume the jury reads the instructions at all, we must assume they read all of them, including instructions Nos. 10, 11 and 12.

While we have considered defendant's objections to the giving of plaintiff's instruction No. 10, we again call attention to the rule laid down in Pajak v. Mansch, 338 Ill. App. 337, and Krug v. Armour and Co., 335 Ill. App. 222. The same criticism is applicable here. Instruction No. 10 is not identified in defendant's motion for a new trial, and no reasons are particularly specified as to why the giving of this instruction was error.

In our opinion, defendant received a fair trial and the verdict is amply sustained by the evidence. The judgment of the Superior Court of Cook County is affirmed.

Judgment affirmed.

Friend, P. J., and Scanlan, J., concur.

44376
44589

87 A

ESTELLE R. FIREBAUGH, et al.,
Appellants,

v.

FRANCIS W. McGOVERN, et al.,
Appellees.

340 I.A. 414

ON REMANDMENT FROM THE SUPREME COURT TO THE APPELLATE COURT.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT

The judgments of this court in these causes reversing the order of the Superior court appointing a receiver (334 Ill. App. 79) and reversing the order approving the receiver's final account (336 Ill. App. 61) have been reversed by the Supreme court (404 Ill. 143). Pursuant to the mandate of that court and for the reasons stated in its opinion the judgments heretofore entered by this court are vacated and the respective orders of the trial court appointing a receiver and approving the receiver's final account are affirmed.

FORMER JUDGMENTS OF THIS COURT ARE VACATED AND ORDERS OF TRIAL COURT AFFIRMED.

Tuohy, P. J., and Feinberg, J., concur.

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44717

F. MAYER, Appellee,	)	
	)	APPEAL FROM MUNICIPAL
v.	)	
	)	COURT OF CHICAGO.
BAR STEELS COMPANY, an Illinois corporation, Appellant.	)	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

340 I.A. 114

Plaintiff sued to recover $1,200 alleged to be due him for his profit as a middleman in the sale of 150 tons of steel to defendant. Defendant filed a verified defense and also a verified counterclaim in which it alleged that plaintiff was its broker and agent to procure a contract for it to purchase 150 tons of cold rolled steel; that plaintiff did not procure the contract authorized but procured a contract for 150 tons of hot rolled steel, thereby damaging defendant, and that plaintiff is therefore not entitled to the agreed commission; that plaintiff violated his duty as a broker, breached his agreement, and that thereby defendant was damaged; that defendant is entitled to recover damages from plaintiff in the amount of the profits defendant lost on an existing resale of the 150 tons of cold rolled steel, or in the alternative, the amount of the difference in value of 150 tons of hot rolled steel and cold rolled steel. The case was tried by the court without a jury. The following judgment was entered:

"'The Court finds the issues against the defendant, Bar Steels Co., an Ill. Corp., on plaintiff's statement

of claim, damages Twelve Hundred and 00/100 Dollars ($1200.00), and issues for plaintiff, F. Mayer, on defendants' counter-claim.'

"This cause coming on for further proceedings herein, it is considered by the Court that the plaintiff have judgment on the finding herein and that the plaintiff have and recover of and from the defendants, Bar Steels Company, an Ill. Corp., the damages of the plaintiff amounting to the sum of Twelve Hundred and 00/100 Dollars ($1200.00) in form as aforesaid assessed together with the costs by the plaintiff herein expended, and that execution issue therefor.

"Judgment on finding for plaintiff, F. Mayer, on defendants' counter-claim."

Defendant appeals from the judgment.

At the outset we will refer to the following point raised and earnestly argued by plaintiff. "I. The defendant has no defense to the action herein for, having first relied on the defense that there was no contractual relationship between the parties, it was estopped from setting up any other defense after suit was instituted." It appears that plaintiff sent to defendant two letters requesting payment of the $1,200, that defendant made no reply to the letters, and that sometime later plaintiff sent defendant a third letter requesting payment of the account, and stating:

"This is now long past due and I must insist upon early remittance, otherwise I shall be obliged to enforce collection.

"Trusting you will give this your prompt attention, I am,

"Very truly yours,

"F. Mayer"

Defendant then sent the following letter to plaintiff:

"BAR STEELS COMPANY
"2613 South Harding Avenue
"Chicago 23, Illinois
"January 24, 1947

"F. Mayer
"701 Transportation Bldg.
"Chicago 5, Ill.

"Gentlemen:

"In reply to your letter of January 21, 1947 we find that we have had no contractual relationship with your company whatsoever and therefore do not owe you any money.

"If you have any further correspondence on this matter please refer it to our attorney, Mr. K. Raymond Clark, 135 So. LaSalle St., Chicago, Ill.

"Very truly yours,

[Signed] "P. J. McGoohan

"Bar Steels Co.
"P. J. McGoohan

"CC: K. Raymond Clark
"135 So. LaSalle St.
"Chicago, Ill."

Upon the trial defendant abandoned the ground for refusal of payment stated in its letter, and in its verified counterclaim it alleges that plaintiff agreed to furnish to defendant 150 tons of cold rolled 3/16" x

24" x 136" sheet steel C-1065, and defendant agreed to purchase said steel.

In Railway Co. v. McCarthy, 96 U. S. 258, the court states (pp. 267, 268):

"Where a party gives a reason for his conduct and decision touching any thing involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law. Gold v. Banks, 8 Wend. (N. Y.) 562; Holbrook v. White, 24 id. 169; Everett v. Saltus, 15 id. 474; Wright v. Reed, 2 Durnf. & E. 554; Duffy v. O'Donovan, 46 N. Y. 223; Winter v. Coit, 7 id. 288."

In Young v. Kich, 369 Ill. 29, the court states (p. 33):

"* * * The rule is well settled that when one party to a contract bases his refusal to perform on one ground, he waives all other grounds and when suit is brought is estopped from setting up other grounds for his refusal. Danberg v. Langman, 318 Ill. 266; Vincent v. McElvain, 304 id. 160; Miller v. Gordon, 296 id. 346." (See, also, Schuyler County v. Mo. Bridge Co., 256 Ill. 348, 353.)

It is apparent that defendant's letter of January 24, 1947, was advisedly written, and it is reasonable to assume that the letter was passed upon by defendant's attorney. From a certain circumstance in evidence it would seem that defendant, at the time the letter was

written, intended to claim that it had purchased the 150 tons of steel from Tower's Inc., of Mendota, Illinois. While there is force in the contention of plaintiff that the foregoing rule should be followed in this case, we have concluded to consider the letter of defendant in passing upon the merits of its main point, viz., that plaintiff did not furnish the kind of steel he agreed to furnish.

The following are the four points raised by defendant in its brief:

"I. Plaintiff as broker is not entitled to commissions from the defendant as principal when he procures a contract other than the one authorized by his principal or makes an unauthorized contract or violates his duties to his principal, particularly where such action causes loss to the principal.

"II. A broker has a duty to carry out the instructions of his principal, to be familiar with the usages and customs of the trade and the material he deals in and to disclose pertinent information to his principal, and where the principal is damaged by his broker's failure to carry out the principal's instructions or by the broker making an unauthorized contract or violating his duties to the principal, the principal has a right of action against his broker and is entitled to recover damages.

"III. The principal is entitled to recover damages from his broker in the amount of profits which the principal lost on an existing resale contract.

"IV. In the alternative the principal is entitled to recover actual damages from his broker in the amount of the difference between the value of the goods actually delivered to the principal and the goods which the principal authorized the plaintiff to purchase."

It will be noticed that the four points are all based upon the assumption that plaintiff was defendant's broker in the transaction in question. It would be a sufficient answer to the four contentions to state that defendant in its verified counterclaim averred that plaintiff agreed to furnish to defendant 150 tons of steel and defendant agreed to purchase the steel. However, we will consider the point urged by defendant to defeat plaintiff's claim. Ryan, president of defendant Company, upon his second appearance as a witness, testified that Leopold Cohen, who testified for plaintiff, told Ryan that the 150 tons of steel were cold rolled. Cohen denied that he ever told Ryan that the steel was cold rolled. It seems to be conceded that cold rolled steel is worth $16 per ton more than hot rolled steel. Plaintiff contended that he offered to sell to defendant a specific lot of steel located at the Tower's, Inc. plant at Mendota, Illinois. The trial court found that defendant failed to prove its contention as to the agreement and we are satisfied that there are certain important facts and circumstances that sustain the finding of the trial court. It is highly significant that the point raised by defendant upon the trial was not mentioned in its letter of January 24, 1947.

There is no question that the transaction between the parties involved certain steel located at the Tower's, Inc. plant in Mendota, Illinois. When plaintiff made an offer to sell 150 tons of steel to defendant, Ryan stated that he could not make an offer for the steel until he first saw it. Ryan then went to Mendota and examined the steel, located at the plant of Tower's, Inc., in Mendota. He testified that "we went out in back of the plant and looked at it from a distance of probably ten feet. The material had been outside for quite a long time and it was covered with grease and oil"; that the purpose of his inspection "was simply to see if there was that kind of tonnage"; that he "did not make an inspection at that time to determine whether or not this steel was hot rolled or cold rolled steel," that when he saw the steel he got a piece of it and brought it back with him to Chicago prior to the time of the purchase; that "I have been in the steel business approximately fifteen years"; that he obtained a sample and brought the same back to Chicago; that he made an analysis of the sample after returning to Chicago; that after he returned to Chicago with the sample piece of steel he measured it with a micrometer. Ryan admitted that after he returned to Chicago he ordered a sample lot of five tons of the steel from plaintiff and offered to pay $90 per ton for it; that said five tons were delivered to him; that a few days later he ordered another sample lot of five tons at the same price and the same was delivered; that the ten tons of steel were sold by defendant to Pullman Standard Car

Manufacturing Company at $160 per ton; that the said Company made no complaint about the quality of the steel. Ryan's testimony that he went all the way to Mendota to examine the steel and then made a superficial examination of it, that he went there merely to see "if the steel was actually in existence" and not to inspect the quality thereof, is not convincing. The trial court found that Ryan was an expert steel man and that he went to Mendota, investigated the steel and took a sample of it, and that there had been no fraud practiced upon Ryan. We are in accord with the trial court's findings. It is strange, indeed, that if Ryan went to Mendota merely to see if the steel was actually in existence and not to inspect the quality of the steel, that he should take a sample back to Chicago and examine it there. The law is well settled that where one buys specific existing goods on inspection, there is no warranty of quality or fitness for any particular purpose, but the rule of caveat emptor applies. (People v. West. Picture Frame Co., 368 Ill. 336, 339; Telluride Power Co. v. Crane Co., 208 Ill. 218, 228; Grass v. Steinberg, 331 Ill. App. 378, 385; Central Commercial Co. v. The Lehon Co., 173 Ill. App. 27, 34; Titley et al. v. Enterprise Stone Co., 127 Ill. 457, 462.) Cohen testified that several days after the ten tons of steel had been delivered to defendant and paid for he telephoned Ryan and asked him if he was going to take the balance of the steel; that Ryan stated that the steel was not cold rolled as he thought it was but that he would take it at a lower

price of $83 per ton; that Ryan stated that he was hesitant about sending $12,450 to Mayer, as he had never met him, and that it was then agreed that the price of the 150 tons of steel should be $83 per ton, and that defendant should pay $75 a ton directly to Tower's, Inc., and the balance, $8 per ton, to plaintiff. Thereafter, pursuant to the agreement, defendant sent a check for $12,450 to Tower,'s Inc. and received the steel. Defendant sold the steel to Lapham-Hickey Steel Company, Chicago, as cold rolled steel. Lapham-Hickey Company refused to accept the steel because it was not cold rolled steel. Ryan testified that thereafter he placed an advertisement in the Tribune offering to sell the 150 tons of steel and that he sold ninety per cent of it at $95 to $100 per ton, making a profit upon the ninety per cent of $3,529.58; that he could not testify what defendant received for the ten percent without looking at the invoices. After a careful consideration of the record, we are satisfied that the trial court was justified in finding the issues against defendant on plaintiff's statement of claim.

As to the counterclaim: The counterclaim is based upon the theory of fact that plaintiff agreed to furnish defendant 150 tons of cold rolled steel and that he failed in that regard and furnished defendant with 150 tons of hot rolled steel. What we have heretofore stated disposes of the counterclaim, adversely to defendant.

The judgment of the Municipal Court of Chicago entered October 7, 1948, is affirmed in toto.

JUDGMENT AFFIRMED IN TOTO.

Friend, P. J., and Schwartz, J., concur.

44742

BOUCHE VILLA VENICE, INC., a Corporation, Appellant,	)	APPEAL FROM CIRCUIT
v.	)	COURT OF COOK COUNTY.
WALDEMAR SANDBERG and MICHAEL J. LAWLER, Doing Business as S. and L. Concessionaires, Appellees.	)	340 I.A. 415

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An appeal by plaintiff from a judgment order entered by the Circuit court of Cook county sustaining defendants' motion to strike plaintiff's complaint and to dismiss the action.

Plaintiff's complaint alleges:

"The plaintiff, Bouche Villa Venice, Inc., a Corporation, complaining of the defendants, Waldemar Sandberg and Michael J. Lawler, doing business as S. and L. Concessionaires, for a cause of action against said defendants, alleges as follows:

"1. That at the several times hereinafter mentioned, the plaintiff was and is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois; and that the defendants, Waldemar Sandberg and Michael J. Lawler, were co-partners, doing business as the S. and L. Concessionaires.

"2. That on or about May 1st, 1948, the plaintiff and the said defendants entered into a certain indenture and contract in writing, a true and correct copy of which indenture or contract is hereto attached, marked Exhibit 'A' and made a part hereof.

"3. That pursuant to the terms of said indenture or contract, the plaintiff, on or about June 11, 1948, duly delivered possession unto the defendants of the parking space and [for] automobiles or other vehicles, the wash rooms and toilets, the concession for resale to consumers of cigars and cigarettes, chewing gum, novelties, souvenirs and check room concession in and about the premises, in Cook County, Illinois, where the plaintiff did its business, and the defendants paid to the plaintiff, on or about the date that said indenture or contract was executed by the plaintiff and the said defendants, the sum of $1000.00, pursuant to the terms thereof; that the plaintiff has performed all conditions on its part to be performed under the terms of said indenture or contract.

"4. That notwithstanding their covenants, promises and agreements in said indenture or contract set forth, the said defendants have wholly failed and refused, although often requested so to do by the plaintiff, to pay to the plaintiff the amount of $1500.00 which was due and payable on the 1st day of July, A. D. 1948 and the further sum of $1000.00 which was due and payable on the 1st day of August, A. D. 1948, aggregating the sum of $2500.00, or any part thereof, and wholly make default on their part in the performance of such indenture or contract; and that the plaintiff is ready, willing and able to perform all covenants, agreements and conditions on its part to be performed under the terms of said agreement.

"WHEREFORE, the plaintiff prays judgment against the said defendants in the sum of $2500.00."

Exhibit A, made a part of the complaint, is as follows:

"This indenture entered into by Bouche Villa Venice, Inc. on Milwaukee Road at the Des Plaines River, Northbrook, Illinois, in the County of Cook, and hereinafter designated as the party of the first part, and Waldemar Sandberg and Michael J. Lawler, doing business as the S. and L. Concessionaires, of the City of Waukegan, County of Lake, State of Illinois, hereinafter known as the parties of the second part, who contract and agree as follows:

"1. The party of the first part hereby leases and rents to the parties of the second part the parking space for automobiles or other vehicles, the wash rooms and toilets, the concession for resale to consumers of cigars and cigarettes, chewing gum, novelties, souvenirs and the check room concession, and the parties of the second part shall have the sole power and right to set, maintain and charge such price rates as shall seem fit to them, but shall make no charge for services rendered but for gratuities. The party of the first part hereby fully agrees that all of the foregoing specifically designated concessions and leases are granted to the parties of the second part exclusively, and that upon the complete integration of this contract that no change, curtailment or other agreement or lease, granting of concessions herein stated, can be made by either of the parties hereto without the full consent in writing of these parties.

"2. In consideration therefore the parties of the second part fully agree to pay the sum of $3,500.00 as

follows: the amount of One Thousand Dollars ($1,000.00) upon the signing of this indenture; One Thousand Five Hundred Dollars to be paid on the 1st day of July, A. D. 1948; and One Thousand ($1,000.00) Dollars, being the balance, to be paid to the party of the first part, on the 1st day of August, A. D. 1948.

"3. It is further agreed by and between these parties that the foregoing leases and concessions shall begin upon the date hereinunder affixed, to be approximately June 11-1948 and this agreement shall stay in full force and effect for the duration of the operational season of the said Villa Venice, which for the purposes of this contract is agreed to be from the aforesaid date until the 4th day of September, A. D. 1948. But in the event the said Villa Venice shall be closed or business stopped for any reason whatsoever, with the exception of an act of God, it is agreed by the parties hereto that the rental consideration hereof, of Three Thousand Five Hundred Dollars, shall be divided by the number of days existing between the date hereinunder inscribed and the 4th day of September, A. D. 1948, and the party of the first part shall receive payment upon a per diem basis for the number of days of actual operation of business, and the parties of the second part shall receive a release, or remittance, for any or all days that the said Villa Venice is not in operation, the said release or remittance to be computed upon the number of days existing from the time operation of business ceases until the 4th day of September, A. D. 1948, inclusive. It is further understood that no other consid-

eration of a valuable, or good kind, shall be paid by the parties of the second part to the party of the first part for any of the leases and concessions herein specified.

"4. The parties of the second part agree to give full, courteous service and consideration to customers of the said Villa Venice to the best of their ability in connection with the business of operating the rights and concessions hereinunder leased by them from the party of the first part. The parties of the second part further agree to maintain and operate these concessions and leases in a business-like and efficient manner.

"WHEREFORE, we have set our hands and seals this day of May, A. D. 1948.

"BOUCHE VILLA VENICE, INC.

"By Albert Bouche
"President

"WITNESSETH:

"and

"W. Sandberg.
"doing business as the S. and L. Concessionaires 330 N. Utica St.
"Waukegan Ont. 3442"

Defendants' motion to strike the complaint was based upon two grounds: "(1) Plaintiff fails to allege a cause of action against these defendants; (2) The contract set forth in said complaint upon which plaintiff seeks to recover is illegal and void under the laws of the State of Illinois as set forth in Chapter 38, Sections 551 and 552 of the Illinois Revised Statutes."

"The Tipping Act in the Criminal Code (Ill. Rev. Stat. 1947, Chap. 38) reads:

"AN ACT prohibiting the leasing or using of any space or portion of places of public accommodation or public resort for the purpose of accepting, demanding or receiving gratuities or donations, commonly called tips, from the public.

* * *

"551. Leasing space for tipping - Prohibited.] Sec. 1. * * * That it shall be unlawful for the owner, proprietor, lessee, superintendant, manager or agent of any hotel, restaurant, eating house, barber shop, theatre, store building, office building, factory, railroad, street railroad, fair ground, baseball or football ground, hall used for public meetings or entertainments, or any other building, office, or space which is a place of public accommodation or public resort, to rent, lease, or permit to be used any part, space or portion thereof, for any trade, calling or occupation, or for the exercise of any privilege, by any person, company, partnership or corporation, for the purpose of accepting, demanding or receiving, directly or indirectly, from the customers, patrons or people who frequent such places of public accommodation or public resort, gratuities or donations, commonly called tips, in addition to the regular, ordinary and published rate of charge for work performed, materials furnished or services rendered, provided, that nothing in this section contained shall be construed to prohibit any employee or servant from accepting or receiving gratuities or donations, commonly called tips, if such gratuities or donations, commonly called tips, are not accounted for, paid over, or delivered,

directly or indirectly, in whole or in part, to any person, company, partnership or corporation, but are retained by such employee or servant, as and for his absolute and individual property.

"552. When lease, contract, etc., void.] Sec. 2. Any lease, contract, agreement or understanding entered into in violation of the provisions of section 1, of this act shall be absolutely void.

"553. Penalty.] Sec. 3. Any person, company, partnership or corporation or any officer or agent thereof, violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding ten thousand dollars for each and every offense, and, in addition thereto such person, officer or agent may, in the discretion of the court, be sentenced to the county jail not less than three months and not more than one year."

Plaintiff contends that "there is nothing in the complaint in any wise showing that the plaintiff's place of business is one of the kind specifically designated, or that it comes within the purview of any general category stated in the law. For all that appears from the said complaint, the plaintiff could be a purely private club, or other organization, to which the general public is not admitted, and certainly a purely private club or private organization, which is not open to the general public, is not subject to the said statutory provision." The point made is that there is nothing in the complaint to show that

plaintiff's place of business "is a place of public accommodation or public resort." It is difficult to believe that this contention is seriously urged. Plaintiff's name would indicate "a place of public accommodation or public resort," and all of the services described in the contract are those identified with cafes, restaurants, and like places of public accommodation and public resort. Defendants were doing business as concessionaires. In Webster's New International Dictionary, Second Edition, Unabridged, p. 553, a concessionaire is defined as "the leaser or grantee of a concession, as at an amusement park, seaside resort, etc." Plaintiff leased and rented to the Concessionaires certain spaces for a term beginning June 11, 1948, and ending September 4, 1948, "but in the event the said Villa Venice shall be closed or business stopped for any reason whatsoever, with the exception of an act of God," defendants "shall receive a release or remittance, for any or all days that the said Villa Venice is not in operation." The Concessionaires were to pay $3,500 for the opportunity of receiving tips from the customers of plaintiff during the period in question. Plaintiff, in its complaint, states that it delivered possession to the Concessionaires of the space in question and about the premises where plaintiff did its business. The instant contention is without the slightest merit.

The second and last contention raised by plaintiff is that "there is nothing in the complaint or in the contract that would make the contract illegal and void under

Sections 551.552 of the Criminal Code." This contention calls for an interpretation of the agreement between the parties. The agreement, as we interpret it, contemplated that the employees of the Concessionaires would receive from customers of Bouche Villa Venice for services rendered by the said employees in parking space, washrooms, toilets, etc., gratuities or donations, commonly called tips, and that the Concessionaires would make no charge for such services. Although not literally so stated in the contract the conclusion is inescapable that the contract contemplated that the employees would turn over to the Concessionaires all tips that they received for such services, otherwise the Concessionaires would have no source of income from said services rendered by its employees. For the period commencing June 11, 1948, and ending September 4, 1948, for the privilege of having an opportunity to receive tips from the customers of Bouche Villa Venice the Concessionaires were to pay to Bouche Villa Venice $3,500. Paragraph 3 of the agreement shows that the actual number of days that the Concessionaires would have an opportunity of receiving tips from the customers of Bouche Villa Venice was a paramount consideration in the making of the agreement, for it provides that the Concessionaires shall have a remittance for any day or days that the Bouche Villa Venice is not in actual operation. It is clear that it was within the contemplation of the parties that the $3,500 was to be realized from the tips received by the employees of the Concessionaires from customers of Bouche Villa Venice. The contract was in

General No. 10405 Agenda No. 8

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1950

340 I.A. 416

NORTH AMERICAN ACCEPTANCE CORPORATION, a Corporation, Plaintiff-Appellee, vs. JOHN J. SERVEN, Defendant-Appellant.	APPEAL FROM CIRCUIT COURT, KNOX COUNTY.

Dove, J.

On May 23, 1949, John J. Serven executed his promissory note for $1400.00, payable to the order of North American Acceptance Corporation, a Corporation, one-half of the principal sum being due on June 3, 1949, and the balance on July 3, 1949. The note contained the usual warrant of attorney authorizing any attorney of any court of record to confess judgment thereon in favor of the holder of the note for the amount due and unpaid, together with twenty per cent attorney fees.

On August 3, 1949, the Circuit Court of Knox County being in recess, a judgment by confession was rendered therein upon this note in favor of the payee and against the maker

IN THE

SUPREME COURT OF ILLINOIS

SPECIAL DOCKET

FEBRUARY TERM, A. D. 1940

340 I.A. 416

CORPORATION, a Corporation,	
Plaintiff-Appellee,	APPEAL from
vs.	Circuit Court,
John 1. Peters,	Cook County.
Defendant-Appellant.	

Note, 4.

On May 24, 1940, John 1. Peters executed his promissory note for $1000.00, payable to the order of Morton American Securities Corporation, a Corporation, one-half of the principal sum being due on June 5, 1940, and the balance on July 5, 1940. The note contained the usual waiver of attorney provision and attorney of any court of record to confess judgment thereon in favor of the holder of the note for the amount due and unpaid, together with costs and attorney fees.

On August 5, 1940, the Circuit Court of Cook County being in recess, a judgment by confession was rendered thereupon by the clerk of said court in favor of the payee and against the maker

for $1688.16, upon which execution was issued. The following day, the defendant filed his motion in the Circuit Court to set aside the judgment and for leave to plead and defend this action. In support thereof, he filed his own affidavit and an affidavit of Beth E. Serven. The affidavit of the defendant is as follows:-

> "John J. Serven being first duly sworn, on oath deposes and says that he is the defendant in the above entitled cause; that he verily believes that he has a good defense to this suit to the whole of plaintiff's demand; that the nature of his defense is:
>
> "That no consideration was given by the plaintiff to the defendant for the note involved in this proceeding.
>
> "That plaintiff in consideration of the note involved in this suit was to sell and deliver with proper certificate of title four used automobiles to the defendant, but that this was never done by the plaintiff.
>
> "That the note involved in this proceeding has in fact been paid by the defendant, in that all four of the used automobiles were returned and delivered by the defendant to the plaintiff prior to the commencement of this suit by the plaintiff; that said automobiles were so returned by the defendant because plaintiff had not delivered to defendant Certificates of Title for the same; and for the reason that said automobiles were materially defective and not in a marketable condition as warranted by the plaintiff or its agents.
>
> "That the defendant is entitled to credit for the value of four automobiles which were delivered and returned by the defendant to the plaintiff prior to the commencement of this suit, and for which no credit has been allowed.
>
> "Affiant has personal knowledge of the matters set forth in this affidavit and if sworn as a witness, can testify competently thereto".

The affidavit of Beth E. Serven is as follows:-

> "Beth E. Serven being first duly sworn deposes and says that she personally knows all the facts stated in the foregoing affidavit of John J. Serven and that the matters and facts therein stated are true."

Upon presentation of the motion of the defendant and the supporting affidavits to the presiding judge of the Circuit Court on August 4, 1949 an order was entered staying any further proceedings under the execution until the further order of court. Thereafter the plaintiff filed its motion to strike defendant's motion to set aside the judgment and for leave to plead. Upon a hearing on September 20, 1949 an order was entered vacating the order of August 4, 1949, staying further proceedings and denying the motion of the defendant to open up the judgment and for leave to plead. To reverse this order defendant has prosecuted this appeal.

The law is well settled that it is necessary upon a motion to vacate or open up a judgment and for leave to plead that a defendant show a prima facie defense. (Gilchrist Transportation Co., vs. North Grain Co., 204 Ill. 510). Supreme Court Rule 26 does not establish any radical departure from this established practice (Walrus Mfg. Co., vs. Wilcox, 303 Ill. App. 226-230). A motion to open up a judgment by confession and for leave to defend is addressed to the sound legal discretion of the trial court and it must appear that the party filing the motion has a meritorious defense to the judgment or some portion thereof. The question of meritorious defense is of prime importance and the motion and affidavits in support thereof are construed most strongly against the party making the application. If the motion and affidavits in support thereof disclose a clear and equitable reason for opening the judgment and allowing the defendant to plead, it is the duty of the court, in the exercise of such equitable powers and in the exercise of a liberal discretion to grant such motion. (Automatic Oil Heating Co., vs. Lee, 296 Ill. App. 628-632 and cases there cited).

Upon presentation of the motion of the defendant and the supporting affidavits to the presiding judge of the Circuit Court on August 6, 1949 an order was entered staying any further proceedings under the execution until the further order of court. Thereafter the plaintiff filed its motion to strike defendant's motion to set aside the judgment and for leave to plead. Upon a hearing on September 20, said an order was entered vacating the order of August 6, 1949, staying further proceedings and the motion of the defendant to open up the judgment and for leave to plead. To pursue this order plaintiff has prosecuted this appeal.

The law is well settled that it is necessary upon a motion to open up a judgment and for leave to plead that a defendant show a prima facie defense. (Hipwell Transportation Co., Inc. Norton Grain Co., 394 Ill. 612). Supreme Court rule 76 does not establish any material departure from this rule and provides (Smith Ill. Pr., Rev. Edition, 1934 Ill. Pra. 326-330). A motion to open up a judgment by confession and for leave to defend is addressed to the sound legal discretion of the trial court and it must appear that the party filing the motion has a meritorious defense to the judgment or some portion thereof. The question of meritorious defense is of prime importance and the motion and affidavits in support thereof are examined most strongly against the party making the application. If the motion and affidavits in support thereof disclose a clear and equitable reason for opening the judgment and allowing the defendant to plead, it is the duty of the court, in the exercise of sound discretion powers and in the absence of a liberal discretion to grant such motion. (Metropolis Oil Heating Co., Inc. Lee, 394 Ill. Syp. 208-212 and cases there cited).

In the present case it appears from the affidavit of the defendant that the consideration of the note upon which this action is based was the delivery to the defendant by the plaintiff of four second-hand automobiles with Certificates of Title. It is alleged that these automobiles were warranted by the seller to be in a marketable condition. The affidavit further states that the plaintiff did not deliver to the defendant these Certificates of Title and that the automobiles were materially defective and not in a marketable condition as warranted. It is further averred that for these reasons the buyer returned these used automobiles to the seller and delivered them to him prior to the time this action was commenced. From the foregoing facts, the buyer concludes that no consideration was given by the plaintiff to the defendant for the note sued on and that he, the defendant, verily believes he has a good defense to the whole of plaintiff's demand. It is true the affidavit does not state in detail the defects of the several automobiles which rendered them in an unmarketable condition, nor is there any specific allegation where the seller made that warranty, or whether it was oral or written, nor is it alleged that the seller accepted the automobiles when they were returned by the buyer, nor is it alleged when they were returned.

In commenting upon the verified petition to open up the judgment in Automatic Oil Heating Co., vs. Lee, 296 Ill. App.628 at pages 632-3, the court stated that it might well have been more specific in stating the facts. Likewise, in the instant case, the affidavit supporting appellant's motion to open up this

In the present case it appears from the affidavit of the defendant that the consideration of the note upon which this action is based was the delivery to the defendant by the plaintiff of four second-hand automobiles with Certificates of Title. It is alleged that these automobiles were warranted by the seller to be in a merchantable condition. The affidavit further states that the plaintiff did not deliver to the defendant these Certificates of Title and that the automobiles were materially defective and not in a merchantable condition as warranted. It is further averred that for these reasons the buyer returned these said automobiles to the seller and delivered them to him prior to the time this action was commenced. From the foregoing facts the buyer concludes that the consideration was given by the plaintiff to the defendant for the note sued on and that he, the defendant, verily believes he has a good defense to the suit of plaintiff mentioned. It is true the affidavit does not state in detail the defects of the several automobiles which rendered them in an unmerchantable condition, nor is there any specific allegation where/~~whether~~ the seller made them warranty, or whether it was part or matter, nor is it alleged that the seller accepted the automobiles when they were returned by the buyer, nor is it alleged when they were returned.

In consenting upon the verified petition to open up the judgment in Automatic Cit Heating Co., Va. Law, 292 Ill. App.508 at page 510-1, the court stated that it might well have been the affidavit authorized counsel's motion to open up this more specific in stating the facts. Likewise in the instant case,

judgment should have been more specific. It lacked particularity and some of the allegations were inconsistent with others. It is not, by any means, a model of correct pleading, but its allegations are sufficient to apprise appellee and the court of the nature and character of appellant's defense, and we believe the ends of justice will best be served if defendant is given his day in court and an opportunity to be heard and present his defense.

The order appealed from is therefore reversed and this cause is remanded to the Circuit Court of Knox County with directions to sustain the motion of appellant and to enter an order opening up this judgment and permit appellant to plead. The lien of the present judgment and execution to stand as security until the final determination of this proceeding.

Reversed and remanded with directions.

200 A

44895

CONSTANTINA PAPPAS, Appellee,	)	
	)	APPEAL FROM SUPERIOR COURT,
v.	)	
	)	COOK COUNTY.
THEODORE PAPPAS, Appellant.	)	

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

340 I.A. 416

On November 8, 1948 plaintiff filed a complaint in chancery for annulment of her marriage to defendant, "or in the Alternative for Divorce," alleging in substance her residence in Chicago, Illinois, her marriage to defendant on September 18, 1947, his wilful desertion of her immediately after the marriage ceremony, his steadfast refusal to live and cohabit with her, and her living separate and apart as a single person since said marriage. Defendant filed his answer on November 10, 1948 admitting all the allegations except that of the alleged desertion. The parties thereupon stipulated that the cause be set down for hearing as a "default" matter on the bill and answer, and pursuant to hearing had on December 6, 1948, the court entered a decree for divorce upon the ground of desertion.

Subsequently, on December 30, 1948, notice having been previously served on plaintiff's attorney, counsel for defendant obtained an order modifying the decree as follows: "It is Ordered, Adjudged and Decreed that the marriage between the complainant and defendant be and the same is hereby annulled and dissolved, the same as if said marriage

ceremony had never been entered into, and the same is annulled and dissolved accordingly and the parties are and each of them is freed from the obligation thereof."

On January 19, 1949 plaintiff's counsel made a motion to vacate the modified decree entered on December 30 on the ground (1) that no notice had been served upon plaintiff, and (2) that the court was without jurisdiction to so modify the decree. The motion was continued for hearing to March 9, 1949, and on that day an order was entered vacating the modified decree of December 30 and confirming the original decree for divorce entered on December 6, 1948. Defendant has taken an appeal from this order.

As the principal ground for reversal it is urged that the allegations of the complaint are insufficient to support a decree for divorce on the ground of desertion. The complaint alleged "that the defendant is guilty of wilful desertion in that immediately after the marriage ceremony on September 18, 1947, the defendant refused and continues to refuse to live and cohabit with the plaintiff as husband and wife and since the 18th day of September, 1947 she has lived separate and apart and as a single person." The statute on divorce (Ill. Rev. Stat. 1949, ch. 40, par. 1) provides that in every case in which a marriage has been, or hereafter may be, contracted and solemnized between any two persons, "and it shall be adjudged * * * that either party * * * has

wilfully deserted or absented himself or herself from the husband or wife, without any reasonable cause, for the space of one year * * * it shall be lawful for the injured party to obtain a divorce and dissolution of such marriage contract." It is urged that the averment of "wilful desertion," unaccompanied by the statutory phrase "without any reasonable cause," renders the complaint defective. It has been held that the refusal by the husband to cohabit is a constructive desertion by him. Virtue v. People, 122 Ill. App. 223; Mathews v. Mathews, 227 Ill. App. 465; Godfrey v. Godfrey, 284 Ill. App. 297. The complaint in the case at bar alleged that defendant never did intend to cohabit with his wife and persisted in his refusal to do so for more than one year subsequent to the marriage ceremony. This, it seems to us, excludes the possibility of any reasonable cause having intervened, and is equivalent to the statutory phrase "without any reasonable cause." Moreover, the original decree for divorce found all the jurisdictional prerequisites to be present, and further found from the evidence adduced (which has not been brought up on appeal) that defendant "had wilfully deserted and absented himself from the plaintiff without any reasonable cause for the space of over one year immediately prior to the filing of the complaint in this cause as charged in the plaintiff's complaint." The cause was not contested; the parties had stipulated that it be set down for hearing as a default matter on the bill and answer; defendant did

not appear at the hearing; and the court found that defendant was guilty of wilfully deserting his wife without reasonable cause. Since the evidence was not preserved, we must assume that these findings were substantiated by the evidence adduced upon the hearing. The sufficiency of the complaint was never challenged by defendant. By filing his answer he waived the contention that he now makes, and it was not until new counsel came into the case after the decree had been entered that the insufficiency of the complaint was first urged.

Defendant relies on Curlett v. Curlett, 106 Ill. App. 81, as holding that a decree to be valid must be based upon a complaint that conforms with the statute, and that the decree will not cure the omission of the words "without any reasonable cause." In that case the court held that the exact words of the statute, "or their equivalent," must appear in the complaint, and that a decree pro confesso concludes the defendant only as to matters alleged in the bill, but an examination of the opinion reveals that the complaint there endeavored to weave into the pleading a substitution of facts of failure to support, indolence and neglect by the husband in lieu of the phrase "without any reasonable cause." The Curlett case does not make it imperative that the phrase "without any reasonable cause" be coupled with the allegation of wilful desertion if the complaint contains other averments and language equivalent thereto. We think the allegations of the complaint in the

case at bar are sufficient to satisfy the statutory requirement.

The complaint in this case will not support an annulment decree. An annulment proceeding differs from a divorce case in that the latter is instituted to sever a marriage relationship admitted to exist; whereas in an annulment proceeding, suit is brought to declare judicially that the marriage between the parties never took place. Arndt v. Arndt, 399 Ill. 490. The complaint in the instant case alleged that the parties were lawfully joined in marriage at Wheaton on September 18, 1947, and defendant's answer admitted this allegation. It being admitted that a legal marriage was entered into by the parties who by age and residence were qualified for marriage, and that it was not procured by fraud or duress, a decree for annulment would not have been proper.

It is also urged by defendant that the vacation of the decree for annulment was obtained after the expiration of 30 days, and was therefore a nullity. As heretofore noted, the original decree was uncontested and entered as pro confesso rather than by default, defendant having interposed his answer and stipulated to a hearing. A note in Smith-Hurd Illinois Annotated Statutes, ch. 110, sec. 174, p. 34, draws a distinction between setting aside judgments by confession and other judgments. It states that the 30-day limitation in paragraph 7, section 174, of chapter 110, has no application to judgments by confession,

and that the court, even after the lapse of 30 days, continues to exercise an equitable jurisdiction to hear, determine and grant motions to vacate, set aside or modify such judgments. The order from which the appeal was taken in this case found that the modification of the original decree from divorce to annulment was "wrongfully procured and entered," and in view of the fact that the original decree was uncontested as pro confesso rather than by default, we think that the chancellor acted within his power to vacate the decree of annulment and re-establish the original decree of divorce.

We find no convincing reason for reversal, and the order appealed from is therefore affirmed.

Order affirmed.

Scanlan and Schwartz, JJ., concur.

44919

PETER KEDAS, Appellee,)
v.)
LUIS G. FLORES, Appellant.)

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Peter Kedas, owner of a building located at 934 Wilson avenue, in Chicago, brought forcible-detainer proceedings against the defendant, Luis G. Flores, alleging that he desired, in good faith, possession of defendant's apartment for the immediate use and occupancy by plaintiff's brother, John Kedas, and his family. Trial by the court without a jury resulted in judgment in favor of plaintiff, from which defendant appeals.

Defendant had occupied the first-floor front in plaintiff's building under a written lease commencing September 1, 1944 and expiring September 30, 1945, at a rental of $37.50 per month. Thereafter he remained in possession and continued to pay rent in that amount without any new agreement. On July 23, 1946 Baird & Warner, Inc., agents, notified defendant in writing that his lease would be terminated as of September 30, 1946, and stated that they would be pleased to discuss with him the terms of a new lease. No new lease was entered into, and defendant continued to occupy the premises under a month-to-month tenancy. Subsequently, on April 22, 1948, defendant was served with a notice stating that plaintiff desired the

apartment for his brother, John Kedas, and terminating defendant's tenancy on June 30, 1948, accompanied by a demand on him to surrender possession of the apartment on that day. The complaint in forcible detainer was filed September 30, 1948.

Defendant filed an answer to the complaint denying that he was a month-to-month tenant, and claiming a hold-over tenancy from year to year from the original lease. He also denied that plaintiff sought in good faith to recover possession of the apartment for his brother, or that his brother was a member of plaintiff's immediate family within the meaning of the Housing and Rent Act of 1947, as amended in 1948. Thereupon plaintiff moved to strike the answer on various grounds, and Judge Fisher, motion and pre-trial judge, struck that portion of the answer which denied that John Kedas was a member of plaintiff's family within the meaning of the act, and allowed defendant to file an amended answer, in which that denial was omitted. In his brief defendant still argues that plaintiff's brother was not a member of the immediate family, and that plaintiff, as landlord, was not entitled to possession of the apartment within the meaning of the act. However, by electing to plead over after the court had stricken that portion of the answer, defendant is precluded from again assigning and arguing the point as error. Smith v. Nauer et al., 338 Ill. App. 43.

As the principal ground for reversal it is urged

that plaintiff was not acting in good faith in asserting that he desired possession and occupancy for his brother, but rather that he desired possession for the purpose of breaking up the apartment occupied by defendant to create smaller units and thus obtain increased revenue. Considerable evidence was adduced upon this phase of the case. After plaintiff had testified that he had instituted suit for the purpose of obtaining the apartment for his brother, "who will immediately move in when the defendant moves out," defendant related a conversation with plaintiff early in September 1947 wherein Kedas, the landlord, had asked him to find another place to live because he desired to remodel the premises into smaller apartments for the purpose of obtaining additional revenue, and that nothing was said about the landlord's wanting the apartment for his brother, John Kedas. Defendant feels aggrieved because the trial judge did not permit him, on cross-examination, to pursue the inquiry as to the "real reason" for seeking possession of the premises, namely, to break up the apartment into furnished rooms so that it could be rented to roomers, thus enabling plaintiff to realize greater profits. However, the record contains sufficient evidence on that question to sustain the court's conclusion that possession was sought in good faith for the immediate use and occupancy of plaintiff's brother.

Defendant's contention that plaintiff used the reason assigned as a subterfuge, and that he was consequently

guilty of bad faith because he desired the apartment, not for occupancy by his brother but in order to gain additional revenue, evidently did not impress the trial judge who, after giving defendant considerable latitude, found that the reason assigned in the complaint was sustained by the evidence. Technicalities aside, there is no force in defendant's contention, because if plaintiff had sought possession for the purpose claimed, the Federal Housing and Rent Act of 1948 afforded him the right to possession for the purpose of creating additional units, without resorting to any subterfuge; he was entitled to possession of the apartment either for the immediate use and occupancy of his brother, or for the purpose of remodeling the premises into smaller units.

The only other point urged by defendant is that plaintiff failed to prove the agency, and therefore the right, of Baird and Warner, Inc., to terminate the tenancy. This point is made for the first time on appeal, and as new matter is not properly before a court of review, but as a matter of fact the proof of agency was sufficiently established. Arthur H. Niestrath, called as a witness on behalf of plaintiff, testified that although he had no direct authorization from the landlord, he was employed by Baird and Warner, Inc., who were under contract with plaintiff and authorized to supervise and manage the property in question.

Since we find no convincing ground for reversal, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

Scanlan and Schwartz, JJ., concur.

44892

GEORGE A. SELIMOS, as Administrator of the estate of CHRIST SELIMOS (also known as HRISTOS SELIMOS), deceased, Appellee,	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	)	
NEW TOM'S RESTAURANT COMPANY, an Illinois corporation, Appellant.	)	340 I.A. 417

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $6,000 entered by the Municipal Court of Chicago on three promissory notes given by defendant to plaintiff's decedent, Christ Selimos. The issue is one of payment. A verdict in favor of plaintiff on a previous trial had been set aside on account of error in a ruling on evidence. The administrator is a brother of the decedent. The president of the defendant company, Nick Selimos, is remotely related to decedent. These are the facts: Commencing in 1942, Nick Selimos, on behalf of defendant company, borrowed $3500 from Christ Selimos and gave him a chattel mortgage in that sum. After that, he borrowed a "couple of thousand dollars more" and on another occasion, $900. On June 1, 1945, that money was still owing, and the defendant company executed three notes for $2,000 each, payable respectively June 1, 1946, June 1, 1947, and June 1, 1948. In November 1946, Christ Selimos died. In his vault there was a certified photostatic copy of the chattel mortgage, but

neither the original nor the three notes were found in his possession. However, the notes were produced at the trial by Nick Selimos. They were not marked cancelled. A sharp issue on the question of payment was then presented to the jury. There was testimony to admissions by Nick Selimos that he owed the money; that he refused to pay, but said he would transmit a sum to relatives in Greece, or that he might transmit a portion of it to Greece for charitable purposes in lieu of payment. On behalf of defendant, there was testimony that the notes had been paid in cash to Christ Selimos before his death. To discredit this there was testimony strongly tending to prove that he was not in the city at the time. To substantiate his claim of payment, Nick Selimos produced what appeared to be pay-roll sheets, one of which is noted in the record at page 80. The last item is a notation of $3400 paid to Christ Selimos on July 3, 1946. At page 82 of the record, on the same sort of sheet, there is a notation showing payment to Christ Selimos on August 5, 1946 of $3192. These entries are out of their proper sequence, and it is contended by plaintiff that they do not reflect a true account.

We have examined the transcript and exhibits, and we can understand what persuaded the jury to find against the defendant. Among other items, an income tax sheet was offered in evidence, showing that the defendant company did a gross business in the year 1946 of $203,901.23. How

did it happen that in a business as substantial as this, no cancelled checks or receipts were produced to prove payment--nothing more than oral testimony of cash payment to a dead man? Other questions like this must have arisen to discredit the case of the defendant.

Plaintiff admitted that possession of the notes by defendant company created a presumption of payment. However, such presumption was rebutted by evidence which the jury believed.

The second amended statement of claim clearly states a case. It avers that the notes, although in the possession of defendant, were not paid, but were due and owing. Nothing more could be said.

Defendant argues that the verdict was a compromise one. The jury did not allow any interest to the plaintiff, finding only for the principal of the notes. Plaintiff was entitled to interest, but does not complain of the verdict. It is not the kind of compromise which the law frowns upon and which gives cause for reversal.

It is urged by counsel that the court erred in giving certain instructions to the jury. He argues that certain inferences can be drawn from these instructions which are prejudicial to defendant. It is our opinion that the instructions state the law with substantial accuracy. In Reivitz v. C. R. T. Co., 327 Ill. 207, the court said: "The test, then, is not what meaning the ingenuity of counsel

can at leisure attribute to the instructions, but how and in what sense, under the evidence before them and the circumstances of the trial, ordinary men acting as jurors will understand the instructions. (Chicago Union Traction Co. v. Lowenrosen, 222 Ill. 506; Funk v. Babbitt, 156 id. 408). Considering the instructions as a series, we hold that the record is free from substantial error." Moreover, we think plaintiff's position with respect to the Municipal Court rules requiring specific objections to be made to an instruction at the time it is given, is sound.

Counsel argues that he should have been permitted to call the attorney for the executor of the estate as a witness, under Sec. 60 of the Practice Act. The statute provides that any party, or person immediately benefited, or the officers, directors and managing agents of a corporation which is a party, may be examined under that section. We have not been referred to any decision of any court in which a lawyer has been considered as within the meaning of that section. Certainly, the language does not warrant such judicial construction.

Judgment affirmed.

Friend, P. J., and Scanlan, J., concur.

44898

AETNA PLYWOOD & VENEER COMPANY, a corporation, Appellant, v. ABRAHAM ROBINEAU, et al., Appellees.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY

340 I.A. 418

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action upon a written guaranty executed by defendant for the payment of certain materials delivered by plaintiff to Dob Manufacturing Company. Defendant's motion to dismiss the complaint was sustained and plaintiff's motion for leave to file an amended complaint was denied. Judgment was thereupon entered against plaintiff. Plaintiff appeals.

Abraham Robineau and Frances Robineau, doing business as A. Robineau and Company, are manufacturers of wood products. March 21, 1947 defendant executed a written guaranty which reads:

> Aetna Plywood & Veneer Company
> 1731 Elston Avenue, Chicago, Illinois
> Attention: Mr. Erickson
> Gentlemen:
> Confirming our telephone conversation regarding the Dob Manufacturing Company, of Racine, Wisconsin, this letter will serve as our guarantee of this account in the amount of $2,500.00, up to June 30, 1947.
> Yours very truly,
> A. Robineau & Co.,
> By A. Robineau (s)

The complaint alleges in substance that on March 21, 1947 Dob Manufacturing Company was indebted to plaintiff in the sum of $3,147.44; that Dob Manufacturing Company requested plaintiff to continue to deliver certain plywood

and veneers used by Dob Manufacturing Company in its business; that as a consideration for the furnishing of further materials plaintiff required additional assurance by some responsible person that the account of Dob Manufacturing Company would be paid; that on March 21, 1947 defendant promised to answer out of his own estate for the payment of the then existing debt of Dob Manufacturing Company and for such future indebtedness as might be incurred if plaintiff would continue to furnish Dob Manufacturing Company with materials; that relying upon the promises of defendant, plaintiff continued to deliver materials to Dob Manufacturing Company; and that as of April 30, 1947 there remained a balance due of $2,847.21 as shown by an exhibit attached to the complaint. Plaintiff claims defendant is liable under the terms of the guaranty in the sum of $2,500 plus interest at five per cent from April 30, 1947.

Defendant bases his motion to dismiss on the following grounds: That the complaint does not state a cause of action; that it violates the statute of frauds; that the guaranty is without consideration; and that the materials sold to Dob Manufacturing Company subsequent to the execution of the guaranty have been fully paid for.

Written guaranties in substantially the same form as in the present case have been held valid. See Frost v. Standard Metal Co., 215 Ill. 240; Newman v. Streator Coal Co., 19 Ill. App. 594; Heeringa v. Ortlepp, 167 Ill. App. 586; Lord & Thomas v. Hahn, 195 Ill. App. 356.

Where by the terms of a written guaranty it appears that the parties look to a future course of dealing or a succession of credits it is generally considered as a contin-

uing guaranty. (Weger v. Robinson Nash Motor Co., 340 Ill. 81; Scovill Manf. Co. v. Cassidy, 275 Ill. 462.) Although the amount is limited, the liability under the guaranty will be regarded as continuing when by the terms of the contract it is evident that the object is to give a standing credit to the principal debtor to be used from time to time either indefinitely or until a certain period. (38 CJS 1209.)

In the instant case the guaranty contains fixed limitations as to time and amount. According to the allegations of the complaint the purpose of the guaranty was to induce plaintiff to continue to furnish materials to Dob Manufacturing Company until June 30, 1947. A valuable consideration consists either of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. (Anderson v. Bills, 335 Ill. 524.) The promise of the defendant to pay for future deliveries of materials is an original undertaking and therefore the Statute of Frauds is inapplicable. See Raveret-Weber Printing Co., Inc., v. Wright, 301 Ill. App. 421.

Section 157, ch. 110, Illinois Revised Statutes 1949 provides that pleadings shall be liberally construed with a view of doing substantial justice between the parties. The question whether the guaranty covered the existing indebtedness of Dob Manufacturing Company to plaintiff at the time of the execution of the guaranty is not free from doubt, but we think the law is clear that defendant is liable on the guaranty for future delivery of materials and that the

complaint in this respect does state a good cause of action.

However, in the amended complaint plaintiff claims payment only for materials shipped after the execution of the guaranty on March 21, 1947. In our opinion the trial court should have granted plaintiff leave to file its amended complaint since a denial of leave to file would have the effect of depriving plaintiff of his day in court. (Village of Averyville v. City of Peoria, 335 Ill. 106.)

For the reasons stated, the judgment is reversed and the cause is remanded for further proceedings not inconsistent herewith.

REVERSED AND REMANDED
WITH DIRECTIONS.

BURKE AND KILEY, JJ. CONCUR.

44991

EMMA THIEME, Appellant, v. STEVE HARRIS and OLGA HARRIS, Appellees.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY.

340 I.A. 419

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendants, operators of a night club known as "Club Hollywood," to recover damages resulting from a fall through a trap door in defendants' premises while plaintiff was engaged as a check girl in a cloakroom. The cause was submitted to the court without a jury. Defendants offered no evidence. At the close of the plaintiff's evidence defendants moved to dismiss the suit. The court sustained the motion and entered judgment accordingly. Plaintiff appeals. Defendants did not file an appearance or briefs in this court.

The evidence shows that defendants employed plaintiff in a cloakroom which was operated for the convenience of defendants' patrons. A considerable portion of the cloakroom floor consisted of a trap door which when open leaned against a wall. Early in the morning of December 9, 1945, while plaintiff was attempting to get some of the wearing apparel belonging to defendants' patrons she stepped backward and fell through the open trap door into the basement.

On the day of the accident a female photographer had been taking pictures of defendants' patrons and after the pictures were taken she delivered the films through the trap door to persons in the basement where the exposed films were developed in a dark room. Whenever the photographer had film ready to be developed she tapped on the trap door and the persons below would open it and receive the film.

According to plaintiff's testimony the first time she saw the photographer use this means of delivering film to her associates in the basement was on the night of the accident; that before the accident exposed films were developed in a trailer parked near defendants' premises, and that before December 9, 1945 she had never seen the trap door used for this purpose.

If there is no evidence tending to prove the material ultimate facts necessary to sustain the plaintiff's cause of action defendants' motion should be sustained. Defendants' motion raises only a question of law as to the legal sufficiency of the evidence to sustain a verdict against the party making the motion. (Anderson v. Board of Education, 390 Ill. 412.)

In the instant case the negligence of the photographer or of the persons engaged in processing the exposed film in the basement in leaving the trap door open without warning to plaintiff does not absolve defendants from liability. It is the duty of the master to use reasonable care to furnish his

employees a safe place to work, and that duty he cannot delegate to another so as to relieve himself of liability for an injury resulting from a failure to perform the duty. (Raxworthy v. Heisen, 274 Ill. 398.) Plaintiff's uncontroverted testimony is that so far as she knew the trap door was used for the first time on the night of the accident in the manner she described. The evidence tends to show there was no warning to plaintiff when the door was opened in the absence of the photographer by persons in the basement.

From a reading of the record we think the evidence was sufficient to sustain plaintiff's cause of action.

For the reasons given, the judgment is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED
FOR NEW TRIAL.

BURKE AND KILEY, JJ. CONCUR.

44896

MORRIS INVESTMENT COMPANY, a corporation, Appellant, v. CORNELIUS BUTLER and LAURA BUTLER, Appellees.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

340 I.A. 419

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a forcible detainer action filed August 17th, 1948 to recover possession of an apartment at 614 E. 51st Street, Chicago. A claim for rent of $150.00 was joined in the complaint. Chapter 80 (Paragraph 8) Illinois Revised Statutes. The Court without a jury found defendants not guilty and entered judgment accordingly. Plaintiff has appealed, claiming error in the admission of testimony and that the judgment is contrary to the evidence and the law.

In a previous suit plaintiff sought to recover from defendants rent for the month of February 1948. A jury returned a not guilty verdict and answered in the affirmative an interrogatory whether plaintiff had received a money order in payment of the rent sought. A new trial was granted plaintiff but the suit was thereafter dismissed. At the instant trial the Court admitted in evidence a copy of the special verdict in the former trial. This was error because the new trial order reopened the case for trial de novo. Indiana Harbor Belt R. R. v. Green, 289 Ill. 81; Feucht v. Clarke,

299 Ill. App. 477. The effect of the new trial order was to nullify the special verdict as determinative of the issue. We shall assume the Court did not consider that verdict if we find there is competent evidence to support the Court's finding and judgment.

The original lease was made between the parties March 16, 1942, for one year. No new written lease was made. In February 1948 defendants purchased a money order with plaintiff as payee for the amount of the February rent. Plaintiff denies receiving the money order. It wrote defendants May 12, 1948, that it had received the March, April and May 1948 rent but not the February rent. August 5, 1948, plaintiff served defendants with a five days notice claiming $150.00 rent for February and August 1948. August 6th defendants mailed plaintiff a money order for the August rent. Plaintiff sent the money order back to defendants who, in turn, re-sent it to plaintiff who has not cashed it. Thereafter money orders for rent each month including January 1949 were sent by defendants to plaintiff who has retained the orders but has not cashed them. March 9, 1949, defendants formally stopped payment on the money order purchased in February 1948. This was done and the proceeds given to defendants. At the trial defendants tendered to plaintiff $150.00 for the August 1948 and March 1949 rent. The tender was refused.

We think that by sending the money order to plaintiff for the August 1948 rent, defendants avoided forfeiture of their tenancy for non-payment of the August rent. Bernstein v. Weinstein et al., 220 Ill. App. 292. Whatever right accrued to plaintiff to recover possession for non-payment of the February rent was waived by its acceptance of the rent thereafter until August. We think that the Court correctly found for defendants in the forcible detainer suit.

Plaintiff's claim for rent was for the months of February and August 1948. At the trial it admitted having in its possession a money order covering the August rent. In its counter suggestions to a motion to dismiss the appeal filed by defendants, filed February 24, 1950, in this Court, plaintiff admits being paid the February 1948 rent on November 2, 1949. We accordingly find that aspect of the case is moot.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

44962

191 A

FRANK V. LEWIS and
BERNICE H. LEWIS, his wife,

Appellees,

v.

MAURICE PHELAN and
VIOLA PHELAN, his wife,

Appellants.

APPEAL FROM THE
COUNTY COURT OF
COOK COUNTY.

340 I.A. 420

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action for damages based on alleged fraudulent representations made by defendants in a sale of their grocery and market business in Midlothian, Illinois. Verdict was for the plaintiffs in the amount of $531.36, defendants' motions for new trial and in arrest of judgment were denied, and judgment was entered on the verdict. Defendants have appealed.

The sale was made on February 24, 1947. The issues made by the pleadings were whether defendants made fraudulent representations, upon which plaintiffs relied, with respect to the delivery of merchandise and to the condition of furniture and equipment for which plaintiffs paid and whether the alleged sale of merchandise was void under the Statute of Frauds being unwritten and no part payment or part delivery having been made.

There was no evidence offered on behalf of defendants. At the close of the plaintiffs' case, the Court

on defendants' motion took from the jury, and decided in defendants' favor the issue with respect to the cash register and counter. The allegation was that this equipment was fraudulently represented to be in good condition. Defendants answered that the plaintiffs knew or should have known that the equipment was in a used condition and that they had inspected it.

The bill of sale with a list of equipment and a stated consideration of $7,611.00, and a separate memorandum listing forty-two cases of coffee and a case of milk were introduced in evidence. Plaintiffs' testimony is that the bill of sale covered $4,250.00 for the store fixtures, plus $2,829.64 for inventory, and $531.36 for the additional inventory listed on the memorandum; that the latter was not in the store inventory but that defendants told him it was at their home; and that they would deliver it to him. The day after the sale plaintiffs took possession of the store. Thereafter they made demand for the additional inventory. It was not delivered. This testimony was corroborated. The jury's verdict properly decided the issue of the sale in favor of plaintiffs.

Defendants argue in their brief that the Statute of Frauds applied to make the alleged contract of sale of the additional inventory unenforceable and that the bill of sale in this case could not be altered by the facts testified to at the trial. The Statute of Frauds does not

apply because this suit was laid in tort for fraud and deceit and was not an attempt to enforce a contract. In any event there was full payment made for the goods at the time of the sale. The testimony with respect to the memorandum of the additional inventory was not to alter the bill of sale, but to make a pertinent explanation of it. The bill of sale did not specify the items of inventory. While the complaint alleged that the agreed sale price for the additional merchandise was $500.00, the ad damnum was $1,000.00 which was sufficient to accommodate the amount of $531.36 which testimony showed was the amount actually paid. The argument does not help defendants.

We see no merit to the contention that the Court had no jurisdiction to enter the judgment when it did. The record shows that the verdict was rendered January 19, 1949. February 2nd defendants made a motion for a new trial. March 21st the Court denied the motion and entered judgment nunc pro tunc as of March 3, 1949, which was the date on which the motion for a new trial was argued. The record does not show the purpose of the nunc pro tunc provision. It is enough for our purpose to know that from February 2nd until March 21st the motion for a new trial was pending and the Court's jurisdiction continued. Section 68 (1) of the Practice Act provides that a party wishing to move for a new trial shall, within ten days thereafter, etc., file his motion in writing and final

judgment and execution thereon shall be stayed until the motion can be argued before the Court and that the time to appeal shall begin to run from the time of the ruling on the motion.

The verdict is proper on the issues and evidence and the judgment is proper in law. The judgment is affirmed.

JUDGMENT AFFIRMED.

LEWE, P. J., and BURKE, J. concur.

44975

HARRY LIPTON, Appellee,	)	
	)	APPEAL FROM CIRCUIT
v.	)	COURT, COOK COUNTY.
PENNSYLVANIA RUBBER COMPANY, a corporation, Appellant.	)	

340 I.A. 420

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a suit by a salesman for a commission of $4,350.78. While defendant's motion to strike was pending, plaintiff moved for a summary judgment. Defendant filed counter affidavits and subsequently a counterclaim which at the time of judgment had not yet been answered. The trial court denied the motion to strike and pursuant to plaintiff's motion, the trial court gave partial summary judgment in the sum of $2,885.17 plus interest of $320.50 and ordered the balance held for trial under defendant's jury demand. Defendant has appealed and plaintiff has cross-appealed.

Defendant contends the summary judgment should not have been entered for any amount. Plaintiff contends it should have been entered for the full amount. Plaintiff confesses that the allowance of interest for vexatious delay was error. The question is whether the partial summary judgment excluding interest was properly entered.

Plaintiff sold automobile tires and kindred products for defendant from 1942 to 1947. There was sold in his territory, during the year 1946, $482,026.09 in defendant's merchandise. During the year he was paid

his salary of $3,600.00 in semimonthly payments of $150.00, expenses of $2,100.00, and a net bonus of $1,718.82. He claims that under the written agreement governing his compensation, he was entitled to an additional $4,350.78, the amount in controversy.

Under defendant's 1946 compensation plan, plaintiff was entitled to his base salary and expenses, ten per cent of his annual salary as a fixed bonus for reaching his base dollar quota of merchandise, and additional bonuses of 2-1/2 per cent of the first $30,000.00 sold in excess of the base and 3 per cent on all additional merchandise sold. Plaintiff was to be credited with all merchandise sold in Cook county, Illinois, and Lake county, Indiana, his territory. Plaintiff's claim is valid if controlled by this plan.

In June, 1946, defendant wrote plaintiff that he would recall conferences in previous February and March when he was advised that defendant was not sure how the 1946 compensation plan would operate; that it had come to the conclusion that the plan would have to be revised effective July 1, 1946; that it had become necessary to establish a ceiling on the "dollar amount of commissionable merchandise" in each territory to obviate any inequalities among salesmen; that ceiling upon merchandise sold by plaintiff for 1946 was $337,000.00; that it hoped no further revision would be necessary; and asked plaintiff to acknowledge receipt of the letter and his agree-

ment to continue employment under the revision by signing and returning the letter. At the botton of the letter is a notation, "The foregoing is hereby agreed to." This notation is dated 6/24/46 and signed by plaintiff.

In plaintiff's affidavit it is stated that defendant through its district manager, Wolfe, said to plaintiff January 2, 1946, "The company is satisfied with your record and we want you to stay with us for the year of 1946, we have a new compensation plan for the year 1946 covering you and other salesmen." Plaintiff had been with defendant four years at that time and each year a different compensation plan had been in effect. Plaintiff said that at the time of Wolfe's statement, he was given the written compensation plan and that he said, "I am very satisfied with this plan and am happy to accept and work under it for the year 1946." Defendant's counter affidavit was made by Wolfe and states that in December 1945 when the 1946 compensation plan was explained in detail to plaintiff and the other salesmen that he explained to the latter that the plan might have to be changed during the year. Wolfe further states in the affidavit that plaintiff and the other salesmen were advised to the same effect in February and March 1946.

If the oral offer and acceptance of January 2, 1946, included the previous oral limitation that the compensation plan could be modified, then the June 20th

modification needed no new consideration.

The trial court was not justified in allowing the partial summary judgment because whether the contract was made for a year, as plaintiff contends, or was terminable at will, as defendant contends, there is no claim that plaintiff was entitled to a bonus until his base quota was reached. As of July 1, 1946, plaintiff's volume in merchandise was $253,988.94 which was less than his base quota. The trial court accordingly should not have determined that plaintiff was entitled to a bonus at that time.

We think that the statement in Wolfe's affidavit of his advice to plaintiff and the other salesmen in December 1945 showed a sufficiently good defense on the merits to all of plaintiff's claim and compelled the denial of the motion for summary judgment. Section 57 C.P.A. This is enough to decide the question before us. Whether the conversation of January 2nd set forth by plaintiff made a contract for a year or whether there was accord and satisfaction by plaintiff's receipt of defendant's check in 1947 are questions that can be disposed of at the trial.

For the reasons given the judgment is reversed and the cause is remanded for trial.

Reversed and remanded.

Lewe, P. J., and Burke, J., concur.

193 A

45021

REESE WILSON and MARY WILSON, Appellees, v. MRS. SAMELLA McBRIDE, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

340 I.A. 421

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a forcible detainer action filed August 4, 1949, to recover possession of the third floor apartment at 3966 Vernon Avenue, Chicago, Illinois, for "immediate and personal use" of plaintiff's daughter. The trial Court directed a verdict for plaintiff, entered judgment accordingly, and defendant has appealed.

The defendant contends that the judgment should be reversed because of the error of the trial Court in excluding from the evidence a certified transcript of a judgment rendered January 25, 1949, in the case of Rev. Reese Wilson v. Samella McBride, #48M 70822, Municipal Court of Chicago. Defendant also contends that the trial Court erred in refusing to permit defendant to cross-examine plaintiffs with respect to the issues, trial, and testimony in that case and in refusing defendant to testify with respect thereto. She argues that in committing these errors the trial Court precluded defendant from establishing a bar to plaintiffs' action under the doctrine of res judicata.

44739

SOL LEFKOWITZ,
Appellant,

v.

ENOZ CHEMICAL COMPANY,
a corporation,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Pursuant to hearing on motion, the Circuit Court entered a summary judgment in favor of defendant and against plaintiff, together with costs, from which plaintiff has perfected an appeal.

The sworn complaint, consisting of five counts, was filed September 17, 1947. In count I it is alleged that plaintiff for 24 years was an employee, officer and member of the board of directors of defendant corporation, being general manager of the office, sales force and manufacturing plant, and that on November 18, 1944 he was executive vice president and general manager; that prior to that date defendant determined that business expansion required plaintiff's resignation and sale to it of his 500 shares of its stock; that this became necessary in order to obtain Federal government approval, then required, to pay such compensation as needed to induce another man to assume the positions of executive vice president and general manager; that defendant also desired plaintiff to relinquish any voice in the corporation's activities by selling his 500 shares of defendant's capital stock; that plaintiff had

worked for less than the reasonable value of his executive services upon defendant's express agreement to adjust his compensation when able to do so; that accordingly plaintiff and defendant orally agreed on or about November 18, 1944 that plaintiff would: (1) resign as executive vice president and general manager to permit defendant to employ someone else and obtain approval of salary needed in order to induce his employment; (2) relinquish any claim to the difference between the reasonable value of his services and compensation received by him; and (3) give up any voice in the corporation's activities by selling to defendant his stock in defendant corporation at $10.00 per share; that in consideration of the foregoing, defendant agreed to give plaintiff $5000.00 for 500 shares of its stock, a salary bonus of $1600.00, and severance allowance of $10,000.00; that in reliance on the agreement plaintiff resigned on November 18, 1944, his resignation to be effective December 15, 1944, gave up his voice in corporate activities by transferring his stock to defendant, and took no steps to recover from it the difference between the reasonable value of his executive services and the amount actually paid him; that pursuant to the agreement defendant paid plaintiff $5000.00 for the stock, $1600.00 bonus, $5100.00 of the $10,000.00 severance allowance, but failed to pay the balance of $4900.00 pursuant to the agreement; and that as the result of defendant's breach he was damaged to the extent of $4900.00.

In count II plaintiff alleged that the true value

of defendant's corporate stock was $15.00 per share, or a total of $7500.00 for his shares, and that he sustained $2500.00 additional damage, being the difference between the true value of the stock sold pursuant to the agreement and the price paid for it by defendant.

In count III it is alleged that plaintiff was employed by defendant on an oral agreement from year to year, wherein it was agreed that plaintiff would receive for his executive services the reasonable value thereof, with stated base salary and bonus which was less than the reasonable value to be paid him annually, and that the difference between that and the reasonable value of his services was to be paid him when the corporation was able to do so; that pursuant to the oral agreement defendant paid plaintiff $6605.00 for 1942, $6899.32 for 1943, $7004.00 for 1944, including bonus, and $5100.00 severance allowance in December 1944, or a total of $25,608.32, whereas the reasonable value for his services was $12,000.00 per year or a total for said period of $36,000.00; and that by reason of the breach of the oral agreement he was damaged in the sum of $10,391.68.

Count IV alleges that defendant agreed to obtain the approval of the Salary Stabilization Unit of the United States Treasury Department for the proposed severance allowance; and that in order to obtain such permission, even though it might require exhausting full administrative appeal, but that this was not done, and accordingly there

was a failure of consideration. It is also alleged that the agreement was signed by plaintiff under duress, he having been advised by defendant's attorney that unless he signed the agreement on the day that the money was paid to him, defendant would not protest or appeal the ruling of the Salary Stabilization Unit.

By amendment plaintiff added count V to his complaint, admitting that on December 22, 1944 he executed an agreement in the nature of a release, setting forth the entire transaction between the parties; but he seeks to revoke and rescind that release either on the ground of duress or absence or failure of consideration.

Defendant filed its answer and the affidavit of its president, averring that it agreed to purchase plaintiff's stock for $10.00 per share and to pay him such portion of the proposed severance allowance of $10,000.00 as the Salary Stabilization Unit might approve; that in exchange therefor plaintiff agreed to sell his stock to defendant and release any claims he might have against defendant arising out of his association with the corporation; that on December 22, 1944 the parties merged their prior oral understanding into a written agreement, in release form, under which, in consideration of defendant's said promises plaintiff released any claims arising either out of his employment by defendant or otherwise, and acknowledged as complete fulfillment of defendant's promises the payment by defendant at that time of $5000.00 for the stock, of

$1600.00 by way of bonus, and the approved severance allowance of $5100.00, together with the right to receive such additional portion, if any, of the proposed severance allowance as might be allowed by the government in the particular appeal then pending; that the agreement of December 22, 1944 constituted the entire agreement between the parties and was and is a complete release of all the claims of plaintiff; that none of the sums recited in the agreement were paid to plaintiff until after he executed the release. Defendant denied that any additional promises were made to induce plaintiff to execute the agreement, but that on the contrary the agreement itself expressly recognized that plaintiff's further rights and defendant's further obligations were limited solely to any additional payment that might be authorized in the then pending appeal; and also denied that any threats or duress had been made or exercised.

Inasmuch as the contents and validity of the release, admittedly executed by plaintiff under seal on December 22, 1944, constitute the principal controversy between the parties, we set it out in full as follows:

"Know All Men By These Presents:

"Whereas, the undersigned, S. Lefkowitz, on November 18, 1944, resigned as a Director and Vice President of the Enoz Chemical Company, an Illinois Corporation (Hereinafter called the 'Company'); and

"Whereas, the Board of Directors of the Company, upon the acceptance of said resignation, authorized the

payment of the sum of One Thousand Six Hundred Dollars ($1600.00), being the balance of the bonus due and unpaid for the year ending December 31, 1944, and the further sum of Ten Thousand Dollars ($10,000) as a severance allowance, subject, however, to the prior approval of the Salary Stabilization Unit of the United States Treasury Department; and

"Whereas, the Company has received approval from the Salary Stabilization Unit of the United States Treasury Department for the full payment of said bonus, but only to the extent of Five Thousand One Hundred Dollars ($5,100.00) in payment of the proposed severance allowance, to which ruling the Company has filed its protest, requesting a reconsideration and a rehearing on the Company's application for approval respecting the payment of the balance of the proposed severance allowance in the sum of Four Thousand Nine Hundred Dollars ($4,900.00); and

"Whereas, an offer to expire December 31, 1944, was authorized to be made on behalf of the Company to purchase, at $10.00 per share, 500 shares of the Company owned and held of record by the undersigned,

"Now, Therefore, Witnesseth:

"The undersigned hereby acknowledges that he has received from the Company the aggregate sum of Ten Thousand Three Hundred Sixty Dollars ($10,360.00), in full payment of said bonus, the severance allowance to the extent of its approval, and the shares of the Company hereinabove mentioned,

itemized as follows:

Company's check Number and Date	Amount of Check	Withholding Tax	Total Amount	Item
6988-Dec. 18, 1944	$1,280.00	$ 320.00	$1,600	Bonus Payment
6989 " " "	4,080.00	$1,020.00	5,100	Severance Allowance
6990 " " "	5,000.00	————	5,000	500 shares

"In consideration of the premises and the payment of the additional sum of One Dollar ($1.00) and other valuable considerations to the undersigned in hand paid by the Company, the receipt and sufficiency whereof is hereby acknowledged by the undersigned, the undersigned has released and discharged, and by these presents does for himself and his heirs, executors, administrators and assigns, release and forever discharge the Company, its officers, agents, employes, affiliates, subsidiaries, successors and assigns, and each of them, of and from all claims, demands, damages, trespasses, actions, causes of action or suits at law or in equity, of whatsoever kind or nature, now accrued, or hereafter to accrue, for or because of any matter or thing whatsoever, omitted or suffered to be done by them, or any of them, prior to and including the date hereof, and particularly, but not in limitation of the foregoing, on account of any matters or transactions arising through, because, or out of the undersigned's employment by or his relationship with the company.

"It is understood, however, that the undersigned reserves his right to receive any further sum, not exceeding Four Thousand Nine Hundred Dollars ($4,900), to which he may be entitled under the full amount of the proposed severance allowance to the extent of, and if, as and when approved by

the Salary Stabilization Unit of the United States Treasury Department on the Company's protest and request for reconsideration and rehearing on its application for the full payment of the proposed severance allowance.

"In Witness Whereof, the undersigned has hereunto affixed his hand and seal this 22nd day of December, 1944.

"(Signed) S. Lefkowitz, (Seal)

S. Lefkowitz"

In support of the amended motion for summary judgment defendant presented the affidavit of H. G. Hollingshead, president of defendant corporation, which admitted the agreement to purchase 500 shares of stock from plaintiff at a price of $10.00 per share and the consummation of said purchase, also the agreement to pay a salary bonus in the amount of $1600.00 and the payment thereof, as well as the payment of $5100.00 to plaintiff as a severance allowance. With respect to this latter item, the affidavit stated that the Salary Stabilization Unit of the United States Treasury Department, acting under wartime regulations then in full force and effect, refused to grant defendant permission to pay plaintiff the sum of $10,000.00 as a severance allowance, but approved payment of only $5100.00 thereof; that said ruling was subsequently appealed by defendant, that the appeal was denied, and that the ruling remained in full force and effect. As exhibits in support of its affidavit defendant attached thereto a letter of the Stabilization Unit, dated December 8, 1944, addressed to defendant's

attorneys and signed by Porter Linder, its head, with which he enclosed the ruling on the severance-allowance application showing that the Department had granted defendant's request for plaintiff's severance allowance only to the extent of $5100.00, and stating that if defendant desired to protest the ruling a request for review would have to be made within 15 days following December 8. Also attached as an exhibit was defendant's request for a rehearing, made within the time prescribed by the Treasury Department. In view of plaintiff's allegation in count IV that defendant failed to appeal and there was complete failure of consideration, we set this letter out in full as follows:

"Deputy Commissioner of Internal Revenue,
Salary Stabilization Unit,
327 South La Salle St.
Chicago, Illinois.

"Dear Sir:

"Reference is made to your ruling of December 8th, 1944, wherein approval was granted the applicant corporation, Enoz Chemical Co. (Hereinafter referred to as the 'Applicant'), to pay to each of the following named employees, S. Lefkowitz and R. J. Jones, (1) the unpaid balances of their 1944 bonus in the amount of $1600 and (2) effective as of the dates of resignation, severance allowances equal to one year's basic salary in the amounts of $5100 and $4500 respectively.

"The amount approved as a severance allowance for R. J. Jones is in accordance with the Applicant's request, but the amount approved for S. Lefkowitz represents an approval of approximately 51% of the original amount requested.

Since the severance allowance approved for S. Lefkovitz appears inadequate under the circumstances, request is hereby made that that part of the Applicant's original request be reviewed and reconsidered.

"As indicated in the original application, S. Lefkowitz was an employee, officer, director and stockholder of the Applicant for a period of approximately twenty four years. In fact, he was one of the oldest employees in the service of the company. He was employed by the Applicant about six months after it started its business. During his period of employment he faithfully and loyally rendered and performed all and whatever services were required of him. In the earlier years of his employment he was paid salaries not fully commensurate with his duties and responsibilities because the Applicant was not in a financial position to pay substantial salaries. However, S. Lefkowitz, knowing that he could earn more money, elsewhere, elected to remain with the Applicant and it is because of this loyalty and faithfulness that the Applicant now feels morally bound to make some adjustment for such past services. While it is true the Applicant in recent years had made adjustments in his salary from time to time, these increases were not based on past services, but on the basis of his current duties and responsibilities.

"The balance of the 1944 bonus in the sum of $1600 approved in his case represents an amount which he had actually earned and which would have been paid by the

applicant to him in view of the fact that his resignation was effective as of December 15th, 1944.

"In arriving at the amount of $10,000 requested as a severance allowance for S. Lefkowitz, consideration was given by the management to the fact that his total 'take home' compensation from the Applicant in the last year was not only the basic salary of $5100 plus his annual bonus of $2100, but also the amount which he received from the Applicant in director's fees and dividends. Upon resignation as a director he also sold his shares of stock to the Applicant. In doing so, he not only lost the basic salary and bonus, but also this additional income which he had been accustomed to receiving from the Applicant. Therefore it is the desire of the management of the Applicant to pay him the $10,000 originally requested.

"Request is hereby made for a hearing in this matter.

"Respectfully submitted,

"Enoz Chemical Co."

On March 31, 1945 Porter Linder, head of the Salary Stabilization Unit, affirmed in writing the denial of greater severance pay for plaintiff.

Along with the pleadings and defendant's affidavit in support of the amended motion for summary judgment, there was presented to the court plaintiff's counter-affidavit, which set out the nature and extent of his employment by defendant for a period of approximately 24 years; the

counter-affidavit further stated that on November 18, 1944 he was in fact the executive vice president and general manager of the company; that during his long period of employment he received compensation substantially less than the reasonable value of his executive services, but agreed to stay on in that capacity for such relatively low compensation because he was told from time to time by authorized officers and agents of the corporation that they realized that he was receiving substantially less than his services were worth and that they would adjust his compensation at such time as the corporation could reasonably afford to pay such additional compensation; that in fact the net profits of the corporation for approximately three or four years preceding November 18, 1944 were sufficiently substantial for the company to have fulfilled its promise; that prior to November 15, 1944 the company determined that it was necessary to employ a new executive in plaintiff's place at a compensation substantially greater than was paid the plaintiff; and accordingly it selected one Vance C. Woodcox for that position; that it was necessary for the company to obtain approval of the Federal government of the compensation the company wished to pay the new executive, and in order to obtain such approval the resignation of plaintiff was desired; that the corporation also wished to purchase the 500 shares of stock then owned by plaintiff so that he would no longer have any possible voice in the corporation's activities after his resignation; that on

November 15, 1944 he attended a meeting of the board of directors of the defendant corporation in his official capacity as vice president and board member, at which his resignation was discussed and where it was agreed that for his resignation and the sale of his 500 shares of stock at $10.00 per share, the corporation would pay him a severance allowance of $10,000.00, together with an unpaid bonus of $1600.00; that pursuant to that agreement plaintiff resigned on that date, his resignation to become effective December 15, 1944, and agreed to sell and deliver his stock to the corporation at $10.00 per share, "being both less than the actual book value thereof and less than the actual amount originally requested by affiant [plaintiff]," upon payment to him of the severance allowance agreed upon and the unpaid bonus already earned by him in the amount of $1600.00; that accordingly resolutions were passed by the board of directors and a release was prepared and presented for his signature; that he was very specifically and strongly advised by one of defendant's attorneys that "nothing more would be done with reference to securing the approval of the Salary Stabilization Unit for the payment of the severance allowance unless the plaintiff on that very day signed a release relinquishing any claims whatsoever he might have against the company and immediately transferred his shares of stock"; that he was specifically told that this meant that the company would not go ahead with plans for a rehearing, nor would the company file any

additional or supplemental information or take any steps at all in support of said appeal or protest the appeal beyond the Chicago office in the event that it was denied even after a rehearing; that he was also advised that he himself as an employee would have no right whatever to take such an appeal or take any action whatsoever on the denial of the severance allowance by the Salary Stabilization Unit, and that in effect affiant was told by defendant's attorney that if he would transfer the stock and sign the release, he would receive the full severance allowance "even if the said Charles Lederer [one of defendant's attorneys] personally had to go to Washington to secure it," but that unless he signed the release on that day and transferred his stock the company would take no steps whatsoever to secure him payment.

We accept plaintiff's statement that "the sole question raised by the Motion for Summary Judgment and the affidavits is whether the plaintiff had given defendant a valid release under seal." Plaintiff admits the terms of the written agreement dated December 22, 1944, embodying the release, and his execution and deliverance of it to defendant on the date it bears. His action, basically, is predicated upon the proposition that defendant had previously made an oral agreement to pay him $10,000 as a severance allowance and has since the signing of the release refused to do so. Nevertheless, he was undoubtedly willing to accept in full satisfaction of defendant's obligation the sum of $5100.00 and such portion, if any, of the remaining proposed $4900.00

as might be allowed by the government under the appeal then pending. Any oral agreement he may have made with defendant was incorporated in the written instrument, which expressly releases defendant from any claim which plaintiff might have arising out of his employment by or his relationship with defendant. In that situation the applicable basic rule of law holds that where an agreement has been reduced to writing its terms cannot be varied or modified by evidence of alleged parol agreements or conversations occurring prior to its execution. Armstrong Paint Works v. Can Co., 301 Ill. 102; Brundage v. Gottschalk, 265 Ill. App. 260.

However, in an effort to avoid the effect of his written release plaintiff takes the position that there was no valid consideration therefor because defendant was orally bound to do the things provided in the agreement by reason of prior promises made before the release was executed, some of which had already been performed. This contention has reference to the matter of severance pay. In other words, he still claims to be entitled to the additional sum of $4900.00, notwithstanding the refusal of the Salary Stabilization Unit to approve it. He says that he was induced to sign the release upon defendant's promise to prosecute to the full extent its appeal of the adverse ruling, and that defendant broke its promise, resulting in a failure of consideration for the release. The facts disclosed by the pleadings, affidavits and exhibits are otherwise; it appears that defendant in good faith interposed an appeal from the first

order of the Salary Stabilization Unit, and when that was disallowed, sought a rehearing, which was likewise refused. Presumably it would have been futile to press the matter further after two unsuccessful attempts.

The remaining contention is that defendant obtained his signature to the release by threatening not to press the appeal if plaintiff refused to sign. As a matter of fact, the documents in support of the motion for summary judgment show conclusively that defendant had, to plaintiff's knowledge, the day before the agreement was signed, filed an appeal from the original denial by the Stabilization Unit, and plaintiff does not challenge the good faith of that appeal, because he quotes from the language of the appeal letter with approval in his counter-affidavit.

With respect to the contention that defendant wrongfully refused to pay the balance of the proposed severance allowance in accordance with an alleged prior oral agreement, the law is well settled that any contract made by a corporation relating to severance allowance or other compensation, entered into during the period when the act was in effect, became subject to the Stabilization Act of 1942 (50 U.S.C.A., Appendix, secs. 961 et seq.) and regulations promulgated thereunder. It is of course conceded that the Stabilization Act was effective at the time of the oral agreement alleged by plaintiff in count I of his complaint, and an employer subject to the act could not agree to pay additional compensation unless prior approval of the

payment by the government was first obtained. De La Rama S.S. Co. v. Pierson, 174 F.(2d) 84; In re Pringle Engineering & Mfg. Co., 164 F.(2d) 299; Kells v. Boutross, 53 N.Y.S. (2d) 734. In the latter case the court said that "any agreement for an unapproved increase in wages is illegal, it is contrary to public policy and is not enforcible in the courts." It is equally well settled that where, as in the case at bar, necessary approval by the Stabilization Board was denied, any agreement to pay additional compensation could not be legally enforced. This would be true even though the act is no longer in effect. De La Rama S.S. Co. v. Pierson, supra; In re Pringle Engineering & Mfg. Co., supra. In view of these rulings, defendant could not have performed the alleged oral agreement and have legally paid plaintiff any sum in excess of $5100.00.

The contention that the stock was worth $15.00 per share, whereas defendant paid only $10.00, is effectually disposed of by the conclusiveness of the release. Plaintiff accepted $10.00 per share, surrendered his stock and resigned his position, and parol evidence as to the alleged greater value of the stock or a prior oral agreement to pay more would not have been admissible.

Upon careful consideration of the pleadings and affidavits we have reached the conclusion that the release is a bar to the recovery which plaintiff seeks; there were no issues of fact to be disposed of, and, therefore, defendant was entitled to summary judgment as a matter of law. Accordingly, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

Scanlan and Schwartz, JJ., concur.

44915

EFFIE COAN,
Appellant,

v.

ALFRED AUERBACH,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

340 I.A. 422

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

On November 18, 1948, plaintiff procured a judgment by confession in the sum of $570.65 and costs against defendant pursuant to a judgment note signed by defendant on November 16, 1945 in payment of a secondhand 1940 Lincoln Zephyr automobile. An execution was issued on said judgment and served on defendant on November 23, 1948. On January 24, 1949, defendant filed a petition in the nature of a writ of audita querela to enjoin all proceedings on said judgment. Plaintiff filed her answer and the petition and answer were set down for hearing on February 24, 1949, at which time plaintiff did not appear. The court heard evidence introduced by defendant and entered an order perpetually staying execution. On March 10, 1949 plaintiff moved the court to vacate the order of February 24, 1949, which motion was denied. Plaintiff prosecutes this appeal to reverse the orders of February 24, 1949 and March 10, 1949.

On November 16, 1945, defendant purchased an automobile from Clarence W. Shaver, giving Shaver a chattel mortgage and an installment note for $665.00,

payable monthly. At the time defendant signed the note, the space provided for the name of the payee was left blank. The note was made payable at the office of Shaver. Defendant made the monthly payments until the balance due was $350.

The petition pleaded defendant's discharge in bankruptcy on September 1, 1948, and the proper listing of the holder of the judgment note, Clarence Shaver, as a creditor; "that on November 18, 1948, Clarence Shaver, as attorney for Effie Coan, confessed a judgment * * * against petitioner on the said note which was discharged in bankruptcy;" that "Effie Coan is merely a dummy for the purpose of confessing judgment;" that all payments on said note were made to Clarence Shaver; that the automobile for which said chattel mortgage was given was turned back to Clarence Shaver.

Plaintiff's theory as stated in her brief is that only matters amounting to a discharge occurring subsequent to the entry of judgment entitles defendant to a satisfaction or a perpetual stay of execution in an action for audita querela. While the defendant entitled the document on which he sought to procure a stay of execution, a petition in the nature of a writ of audita querela, the facts which he set up in the petition were ample on any theory to warrant such a stay. Even a petition in the nature of a writ of audita querela does not require that the fact on which it is based should

have occurred subsequent to the entry of judgment, where it appears that the plaintiff had fraudulently proceeded with the action after payment or discharge. Lovejoy v. Webber, 10 Mass. 101, cited with approval in Bower, Inc. v. Silverstein, 298 Ill. App. 145. In any event, pleading a discharge in bankruptcy for the purpose of staying a writ issued on a judgment entered by confession is not subject to the general rule. Morris v. Levin, 302 Ill. App. 173, is conclusive on this point. We quote the following from the opinion by Mr. Justice McSurely: "The order of discharge [in bankruptcy] nullified any liability of defendant arising out of the note. The power to confess judgment was at the same time invalidated and there was no judgment against the defendant which required prompt action on his part to obtain a stay of execution." Various cases are cited in that opinion in support of this position.

For the reasons given, judgment is affirmed.

Judgment affirmed.

Friend, P. J., and Scanlan, J., concur.

44912

VALERIE H. GALEK, Plaintiff - Appellee, v. RICHARD L. WINTERS, Defendant - Appellant, and CONSOLIDATED BISCUIT COMPANY, Defendant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

340 I.A. 35

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant Richard L. Winters appeals from a judgment in the sum of $3,000 entered upon the verdict of a jury in an action to recover damages for personal injuries. Defendant's motions for a directed verdict and for a judgment notwithstanding the verdict were denied.

About 5:30 p.m. on January 30, 1947, plaintiff Valerie H. Galek was struck by an automobile driven by defendant in a southerly direction on Oakley Boulevard while plaintiff was attempting to cross Walton Street, an east-and-west street, in the City of Chicago.

Defendant contends that his motions for a directed verdict and for judgment notwithstanding the verdict should have been allowed, on the ground that the plaintiff was guilty of contributory negligence.

Plaintiff testified that on the day of the occurrence she walked west on the south side of Walton street accompanied by Loretta Swieton; that when she reached the intersection of Oakley Boulevard she stopped at the southeast corner of the intersection; that there was a

traffic signal light at Augusta Boulevard one block north of Walton Street; that a line of northbound automobiles on Oakley Boulevard had stopped, waiting for the traffic signal light to change at Augusta Boulevard; that she walked on the crosswalk between the northbound automobiles at a "normal gait" in a westerly direction; that as she passed between the standing automobiles on the east side of Oakley Boulevard she saw the defendant's automobile about one hundred feet north of Walton Street traveling in a southerly direction at twenty-five or thirty miles an hour, and that back of and to the left of defendant's automobile there was another southbound automobile which stopped about fifteen feet north of the south crosswalk of Walton Street, and that defendant's automobile swung to the left toward the center of Oakley Boulevard, where it struck the plaintiff as she was walking in a westerly direction across Oakley Boulevard. Oakley Boulevard is about thirty-five or forty feet wide, and Walton Street is about thirty feet wide.

Loretta Swieton testified in substance that when she and the plaintiff reached the intersection of Walton Street and Oakley Boulevard they observed northbound automobiles at the intersection and before crossing Oakley Boulevard in an opening in the line of northbound automobiles she and the plaintiff looked in both directions; that the witness saw two southbound automobiles a hundred feet or more north of the intersection; that one of the southbound automobiles stopped; that the automobile driven by the defendant struck the plaintiff while she was in the middle of Oakley Boulevard; that the defendant's automobile was traveling about twenty-five or thirty miles an hour.

The question presented by defendant's motions is whether there is any evidence fairly tending to prove the cause of action alleged. (Hughes v. Bandy, 404 Ill. 74.) In the instant case we think there was evidence tending to prove the plaintiff's cause of action and that the jury could find plaintiff not guilty of contributory negligence. Defendant's motions were, therefore, properly denied.

According to the testimony of defendant Winters there was no automobile alongside of him as he proceeded south on Oakley Boulevard immediately preceding the occurrence; that he had crossed the south crosswalk of Walton Street when plaintiff was struck, and that his automobile was traveling about fifteen miles an hour. Defendant's witness Thomas testified that his northbound automobile was at the time of the occurrence standing still from two to four feet south of the south crosswalk of Oakley Boulevard waiting for the traffic light to change at Augusta Boulevard; that the plaintiff proceeded across "at a fast pace," and that defendant's car was traveling about fifteen or twenty miles an hour.

The record shows that plaintiff called defendant Winters as a witness under section 60 of the Civil Practice Act and propounded the following questions:

> "Now, Mr. Winters, will you please tell the court and jury how long you have known Mr. Vogel?"
>
> "Mr. Winters, did you engage personally Mr. Vogel to represent you in this lawsuit?"

After defendant's objection was sustained to the first question plaintiff's counsel persisted in asking the other question. Defendant says that the only possible purpose of

these questions was to suggest to the jury that an insurance carrier had employed Mr. Vogel to represent defendant. The questions complained of are entirely immaterial to the issues. We think the jury might draw the inference defendant asserts and prejudice to the defendant result therefrom, especially where, as here, the case is a close one on the facts. See St. Clair Housing Authority v. Quirin, 379 Ill. 52, and Mithen v. Jeffery, 259 Ill. 372.

Criticism is leveled by the defendant at plaintiff's instruction 25 which instructed the jury that the driving of an automobile within a built-up residential district at a rate exceeding twenty-five miles an hour is prima facie evidence that the vehicle is being operated at a rate of speed greater than is reasonable and proper. This instruction has been repeatedly condemned. See The People v. Sikes, 328 Ill. 64; Johnson v. Pendergast, 308 Ill. 255; Scally v. Flannery, 292 Ill. App. 349. In the Scally case at page 353, the court, speaking of a similar instruction, held: "the giving of such an instruction, in a case which is close upon the facts, is reversible error," on the ground that the instruction complained of has a tendency to mislead the jury.

Since this case must be retried, there is no need of passing on the other contentions made by the defendant.

For the reasons given, the judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

BURKE AND KILEY, JJ. CONCUR.

44980

WILFRED J. MALONE, et al.,
Appellees,
v.
WILLIAM E. RAY, etc.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

340 I.A. 536

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action to recover moneys paid by plaintiffs to defendant on a written real estate contract. Trial by the court without a jury resulted in a finding and judgment in favor of the plaintiffs and against defendant in the sum of $1,791.85. Defendant appeals.

According to the allegations of the statement of claim defendant agreed to convey to plaintiffs certain real estate upon the payment of $1,795 in the following manner: $700 down and the balance of $1,095 in monthly instalments of $20 each, with interest at 6 per cent; that the plaintiffs paid the entire sum except the balance of $60.93 which they tendered to defendant; and that defendant refused to deliver a deed for the premises although requested to do so. Attached to the statement of claim as exhibits are a copy of the contract and a statement showing all of the payments alleged to have been made by the plaintiffs to defendant.

Defendant answered admitting execution of the contract for the sale of the real estate, but made a general

denial of all the other allegations of the statement of claim.

Defendant contends that the record shows that no evidence was offered by either party upon which the court could make a finding of facts on which to enter a judgment. There is no transcript of the testimony offered at the trial in the record. The judgment order recites: "Now come the parties to this cause and thereupon the trial of this cause is now here resumed before the court without a jury and the court having heard the evidence and the arguments of counsel and being fully advised in the premises, enters the following finding, to-wit." Then follows the finding and judgment against "William E. Ray, d.b.a. William E. Ray and Associates." The judgment imports verity without setting forth the facts and evidence on which it is rendered.

The rule has been repeatedly announced that in the absence of a certificate preserving all the evidence heard by the trial court, it will be presumed that there was sufficient evidence to warrant the finding. (Brown et al. v. Miner et al., 128 Ill. 148.)

Defendant insists that a finding and judgment against him and one designated as "associates" is wholly void. Rule 17 of the Municipal Court of Chicago provides that any person carrying on business within the City in a name or style other than his own name may be sued in such name or style as if it were a firm name. See Collateral Finance Co. v. Braud, 298 Ill. App. 130. We think the judgment in the instant case is a valid judgment against William E. Ray and that

the phrase "d.b.a. William E. Ray and associates" is purely descriptive and superfluous.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE and KILEY, JJ., CONCUR.

45024

JACK C. SMITH, Appellant, v. DOROTHY P. SMITH, Appellee.	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

February 2, 1948 respondent Dorothy P. Smith was granted a decree of divorce on her cross complaint, on the ground of extreme and repeated cruelty, from petitioner Jack C. Smith. Custody of the child of the parties, Susan Ann Smith aged four years, was given to respondent for a period of six months every year. The decree further provided by agreement of the parties that the minor child "be reared in the Catholic religion and enrolled in a Catholic school."

August 15, 1949 Jack C. Smith filed a petition alleging that respondent has remarried and is residing at North Platte, Nebraska in a two-room apartment and that the minor child is living with the parents of respondent; that the parents of respondent refuse to allow the minor child to attend the Catholic church; that the child is now of school age, and that respondent has made no provision for the child's attendance at a Catholic school. The petition prayed that the divorce decree be modified by awarding sole custody of the minor to the petitioner and permitting respondent to visit the child at all reasonable hours.

August 15, 1949 an order was entered modifying the decree as prayed for in the petition. So far as the record shows respondent was not present nor does it appear that any evidence was presented in support of the allegations of the petition. On the same day shortly after the entry of this order respondent's counsel appeared in court and moved to vacate the order modifying the decree. He was also given leave to answer the petition in ten days.

In her verified answer respondent averred in substance that she has remarried and has a suitable home for the child; that the only time her parents had custody of the child was when the respondent was confined to a hospital for an operation; that her parents are not prejudiced with reference to any religion; that the minor child is too young to be enrolled in any school; and that respondent will enroll the minor "in a proper school conducive to the better welfare of the child."

Upon a hearing the chancellor vacated the order of August 15th, thus restoring the provisions of the original divorce decree with respect to the custody of the minor child. Petitioner appeals.

The record shows that the order appealed from recites that respondent "agrees to enroll said child in a Catholic parochial school." At the time of the hearing the minor was about five years of age and in the custody of the petitioner. Upon interrogation by the chancellor in open court respondent agreed to comply with the provisions of the decree as stated in the order.

Petitioner insists that no issue is raised by respondent's answer, hence there was nothing before the chancellor. While the answer could have been couched in better language to form clear-cut issues, we think it was sufficient, together with the statements made to the chancellor, to present the question here determined. All the authorities hold that in a situation like this the best interests of the child are pre-eminently to be considered.

A decree fixing the custody of the child is final on the conditions then existing and should not be changed afterward unless on altered conditions since the decree or on material facts existing at the time of the decree but unknown to the court, and then only for the welfare of the child. (Thomas v. Thomas, 233 Ill. App. 488.) The court has a large discretion in determining to which parent the child will be given. (Draper v. Draper, 68 Ill. 17; Maupin v. Maupin, 339 Ill. App. 484.)

Under the circumstances shown by the evidence we cannot say that the chancellor abused his discretion. In our view the custody of the minor child should be restored to the respondent as provided in the divorce decree. In the event respondent fails thereafter to observe the terms of the decree petitioner may, upon a proper showing, obtain relief.

For the reasons stated, the order is affirmed.

ORDER AFFIRMED.

BURKE AND KILEY, JJ. CONCUR.

45037

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
v.
CARL KOHLER,
Plaintiff in Error.

WRIT OF ERROR TO
MUNICIPAL COURT
OF CHICAGO.

340 I.A. 637

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

An information filed in the Municipal Court of Chicago charged that on April 22, 1948, Carl Kohler "did then and there unlawfully, knowingly and wilfully cause, aid or encourage Marion Kohler, then and there being a female child under the age of 18 years to be or to become a delinquent child; did knowingly and wilfully have sexual relations which directly tended to render said child delinquent. Contributing to delinquency - in viol. Sec. 103-104, Chap. 38, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois." On arraignment the defendant pleaded "not guilty." The cause was submitted to the court for trial without a jury, resulting in a finding of guilty. Judgment was entered thereon and defendant was sentenced to serve a term of one year in the House of Correction. By writ of error he seeks to reverse the judgment.

The only point urged is that the information fails to charge a crime. The information was not questioned in the trial court. The test for the sufficiency of an

information is whether or not the defendant is notified of the charge which he is to meet, so that he can properly prepare his defense. (People v. Fry, 403 Ill. 567.) The information charges the offense in the language of the statute. It then individuates the offense by charging that the defendant "did knowingly and wilfully have sexual relations which directly tended to render said child delinquent." In People v. Fry, supra., the defendant contended that the words "indecent and lascivious" were not sufficiently precise. In affirming the judgment the Supreme Court held that they were words of common usage with a recognized meaning, connoting lustfulness and sensuality. In People v. Johnson, 392 Ill. 409, the court held an information to be sufficient which charged the defendant with contributing to the delinquency of a minor by committing "indecent acts" on the person of the child.

In our opinion the information adequately apprised the defendant of the crime charged. Therefore, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. AND KILEY, J. CONCUR.

44782) Consolidated
45008)

LAURA GOULD,
Appellee,
v.
GEORGE GOULD,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a divorce action. Two appeals have arisen from it and pursuant to motion in this Court by appellee have been consolidated. In #44782 defendant appeals from a nunc pro tunc order entered October 18, 1948, to vacate a previous decree dismissing plaintiff's suit for want of prosecution. In #45008 defendant appeals from an order of July 26, 1949, allowing plaintiff attorney's fees and costs to defend the appeal in #44782. Defendant seeks the reversal of both orders.

Plaintiff made a motion in this Court to file an amendment to the record consisting of a notice, an additional report of proceedings and statement of trial judge of reasons for entering the nunc pro tunc order, and two letters in an envelope with attached affidavit. Defendant agrees to the filing of the notice but objects to the balance. The motion and counter suggestions were taken with the case. The letters, envelope, and affidavit were not in evidence and are not otherwise part of the proceeding. As to them the motion is denied. The notice may be filed and will be considered in disposing of the case. The balance of the motion will be considered in our disposition of the merits of the case.

The parties were married June 11, 1930. Four children were born of the marriage who, when the parties separated in November of 1943, were 12, 10, 8 and 7 years of age. Following the separation the defendant voluntarily paid to the plaintiff $60.00 per month for rent and $22.00 each week for support of the children. Plaintiff filed suit for divorce June 22, 1945, on the grounds of desertion. June 4th, 1946, the cause was placed on a Trial Calendar as #715. September 10 it was set for hearing November 14th and was then continued from time to time and on January 8, 1948, was placed on Trial Calendar # C-238. On April 14, 1948, Judge Graber dismissed the cause for want of prosecution when it was called on the No Progress Calendar. The cause nevertheless came on for hearing on the Trial Calendar and on June 15 was heard and on July 2 the decree for plaintiff was entered granting her a divorce and custody of the children.

October 7, 1948, plaintiff made a motion to vacate and set aside as of April 14, 1948, the dismissal order entered that day. In support of the motion plaintiff's Attorney Baer made an affidavit that he appeared in April before Judge Graber when the cause was called on the No Progress Calendar, that he advised the judge that the cause was then pending on the Contested Trial Calendar, that the judge ordered the cause stricken from the No Progress Calendar and transferred to Divorce Calendar #2, and that the dismissal order was a mistake of the clerk. On motion of the defendant hearing on the motion to vacate was continued to October 18th.

The nunc pro tunc order entered that day by Judge Graber makes findings in accordance with the statements in the affidavit. Defendant contends the nunc pro tunc order is void because the record does not show a written minute or memorial of a judgment other than that dismissing the case on April 14, 1948.

The parties agree that a nunc pro tunc order after term time cannot stand except in the case of some fault, neglect, or oversight, where there is a minute or memorial paper of the judgment actually made previously. Knefel v. People, 187 Ill. 212; Brown v. Hamsmith, 247 Ill. App. 358.

February 3, 1947, Attorney Boyle was substituted as defendant's attorney. After the dismissal order was entered on April 14, 1948, he made a motion May 4, for leave to withdraw. By agreement this motion was continued to May 11, without further notice, and on that date continued to May 18. An order on May 18 granted the motion, "without prejudice * * * to the hearing date heretofore set." The next order in the record is that of Judge Epstein June 10 reciting that the trial in the above entitled cause had been previously set for that date and the defendant failed to appear. Because of these facts plaintiff claims that under Freise v. Mid-City Trust and Savings Bank, et al., 298 Ill. App. 17, and Brown v. McGraw, 338 Ill. App. 201, the Court was revested with jurisdiction.

Notice of Attorney Boyle's motion May 4th was served on defendant at the State Street office. We can rightly infer

therefore that defendant had knowledge after the entry of the dismissal order that the cause had been set for hearing and permitted his attorney to withdraw without prejudice to the hearing date and employed no attorney to succeed Attorney Boyle to object to the jurisdiction of the Court and thus, without objection, permitted the cause to develop through an ex parte hearing into the entry of a decree for divorce. Under these circumstances we agree with plaintiff that the Court was revested with jurisdiction. The revesting of jurisdiction was effective to nullify the dismissal order.

There is no written minute or memorandum in the original report of proceedings however to justify the order of October 18, 1948. The proferred additional report of proceedings is no aid in this respect. It is not helpful and the motion to file it is denied. The nunc pro tunc order of October 18, 1948, is void.

The notice of appeal in #44782 was filed January 17, 1949. May 17th plaintiff filed a petition for fees and costs to defend the appeal. Defendant answered raising the questions of law presented in appeal #44782. May 26th "all parties being represented by counsel" the cause was continued generally to be heard on notice. June 22nd plaintiff filed an unsworn petition which alleged that the Court had stated plaintiff was entitled to fees and costs and suggested that proof of defendant's earnings be made; that defendant's attorney stated that if the action was deferred, he would attempt to settle

the matter; and that plaintiff having received no word of settlement prays for an order allowing the fees and costs. July 26th plaintiff filed a third petition stating that plaintiff's attorney had diligently but unsuccessfully sought to subpoena the defendant and prayed in the alternative an order for fees and an order directing defendant to appear to testify. On this petition the Chancellor allowed plaintiff $350.00 for attorney's fees and costs on appeal. This is the order before us.

Defendant's counsel appeared at the hearing July 26th pursuant to service of notice upon him the preceding day. The Court denied his motion for a continuance within which to have defendant, who was out of town, prepare a petition for change of venue. His additional motion for a continuance to "endeavor" to bring defendant into Court to testify was denied. Defendant's attorney said that if defendant would not come to Court, he would withdraw. Defendant's counsel's previous appearances pursuant to the several petitions and the uncontroverted indication by the Chancellor of his opinion on the matter were sufficient grounds for denial of the first motion. In view of the record of defendant's absences from previous hearings and lack of assurance that defendant would be present if the matter was continued, we see no abuse of discretion in denying the second motion for continuance.

We see no merit in defendant's complaint that the notice for July 26 was on a third petition to be filed that

day and at the hearing defendant's counsel was surprised by the order entered on the petition of May 17. There is no substantial difference between the subject matter and prayers of the two petitions. We cannot see how defendant could have been prejudiced.

We have decided in the previous opinion herein that the order of October 1948 was void. It does not follow however that the order allowing plaintiff attorney's fees to defend the appeal from that order must fall. We think justice requires that allowance be made in order to enable plaintiff to defend the appeal in order to protect the decree in her favor. Kunstmann v. Kunstmann, 333 Ill. App. 653. There is no contention made that the allowance was excessive. The order is affirmed.

The order of October 18, 1948, is reversed; the order of July 26, 1949, is affirmed.

THE ORDER IN CASE #44782 is REVERSED;
THE ORDER IN CAUSE # 45008 is AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

45032

ANNA REZEK, Appellant, v. ISADORE FISHMAN, M. R. SCHACHTMAN and JOSEPH SPRINGER, Appellees.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

340 I.A. 638

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an equitable action filed January 1949 by a stockholder who seeks to compel payment to her by defendants of her proportionate share of the "fair and reasonable" sale price of corporate real estate which she claimed was fraudulently sold for a "ridiculously" low price. She also seeks an accounting. Her original and first amended complaints were stricken. The motions of defendants' Fishman and Schachtman, to dismiss plaintiff's second amended complaint as to them were sustained and a decree entered dismissing the suit as to them. Plaintiff was given leave to file a third amended complaint against defendant Springer. She has appealed from the decree.

The second amended complaint is in two counts. The allegations of the first are adopted as a basis for the accounting prayed in the second count. The defendants' motions admit well pleaded allegations.

In 1931 plaintiff purchased from the Garfield State Bank of Chicago bonds of the Ballyarnet Corporation which were subsequently converted into thirty shares of the Corporation stock. In April 1941 Fishman and Schachtman

were respectively President and Secretary-Treasurer of the Corporation and were both Directors. On April 28, 1941, the Corporation deeded in trust to the Trust Company of Chicago its real estate consisting of a thirty-eight flat building with its furnishings at 4921-27 Quincy Street, Chicago for $38,500.00. The Trust Company of Chicago took title in its name for the benefit of the defendant Springer. At the time of the sale the real estate provided a gross income of $16,000.00 annually and was 100 percent rented. In the Fall of 1948 Springer offered plaintiff $17.34 for each of her thirty shares of stock. The offer was declined by plaintiff. The deed to the trust company carries revenue stamps in an amount indicating that the sale price of the real estate was $65,000.00.

Plaintiff alleges that the sale price of the property was "ridiculously" low; that she received no notices of the purported sale and knew nothing of the sale; that in October or November 1946 she made inquiry for the first time in the Garfield State Bank regarding her stock but received a "push around"; that in 1948 she retained an attorney who was refused information about the stock in question; that the reasonable fair cash market value at the time of sale was $80,000.00 and at the time of suit $125,000.00; and she alleges that the difference between the indicated sale price of $65,000.00 and $38,500.00, namely, $26,500.00 "fraudulently found its way in the pockets of persons" known by defendant and to the detriment of plaintiff and other stockholders;

that "some" of the stockholders on March 1, 1941, received notice of the offer of the trust company to purchase for $38,500.00, a breakdown of the net proceeds which would pay $14.43 per share if the offer were accepted, and the recommendation of the Directors that the offer be accepted; that Springer, following the notice purchased a majority holding of the stock for $35 or $40 a share so as to perpetrate the fraudulent purchase; and that the real estate was not offered to the general public for sale for $38,500.00 but only "to those in the know".

The motions to dismiss were grounded among other things on laches and failure to state a cause of action based on fraud. The sale was made in April 1941. Notice was given to "some" of the stockholders in March 1941. The records in the Recorder's Office, according to plaintiff, show title taken by the trust company for the benefit of Springer. The Corporation was dissolved December 20, 1944. The majority of the stockholders, following the notice and presumably before the sale, transferred their stock to Springer.

Plaintiff alleges no facts which would justify her waiting until 1949 to file suit. She alleges that in 1946 she went to the Garfield State Bank to inquire for the first time about "information regarding her stock". No reason is given for her waiting that long. She does not say that she then learned for the first time of the sale. There is no allegation when she learned for the first time of the sale.

There is no allegation of any notice to or demand upon the defendants before 1946 or before the dissolution of the Corporation in 1944 which would have given them reason for preserving what records may have been necessary to protect them in a suit by her. The question here is not mere delay. We think it is apparent that the position of defendants has been changed during the delay to their disadvantage as against plaintiff's suit. We think it requires no citation of authorities to support our conclusion that plaintiff is guilty of laches.

The only allegations to support the charges of fraudulent sale are those on information and belief that the reasonable market value of the property at the time of sale was $80,000.00 and at the time of suit $125,000.00; that the revenue stamps indicated a selling price of $65,000.00 and that the difference of $26,500.00 between the indicated sale price and the stated sale price fraudulently found its way into pockets of persons; that Springer purchased the stock so as to be in position to perpetrate the fraudulent sale; and that only "those in the know" could purchase for the price of $38,500.00. There are no facts stated upon which plaintiff's beliefs are founded and the allegations of fraud upon information and belief cannot therefore be sustained. Murphy v. Murphy, 189 Ill. 360.

We need consider no other points. On the two grounds considered the decree of dismissal was right. It is hereby affirmed.

DECREE AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

No. 10380

Abstract

In the

APPELLATE COURT OF ILLINOIS

Second District

October Term, A. D. 1949

340 I.A. 639

LYLE WELCH, Defendant-Appellant,	)	Appeal from the City Court of Kewanee.
vs.	)	Honorable Julian P. Wilamoski, Judge Presiding.
ALETHA WELCH, now ALETHA WELCH ABBOTT, Plaintiff-Appellee.	)	

BRISTOW, J. -- Defendant, Lyle Welch, is appealing from a judgment of the city court of Kewanee, ordering him to pay plaintiff, Aletha Welch Abbott, the sum of $600.00 for the support of their minor child, pursuant to the terms of their divorce decree.

The primary issue presented on this appeal is whether the city court erred in refusing to enforce an alleged oral agreement between the parties, modifying the support provisions of the divorce decree.

No. 10380

In the

Second District

October Term, A. D. 1940

LYLE REICH,

Defendant-Appellant,

vs.

ALETHA REICH, now ALETHA ABBOTT,

Plaintiff-Appellee.

Appeal from the City Court of Kewanee.

Honorable

J. Ivan D. Wilkowski,

Judge, Presiding.

APPELLEE, [illegible] Reich, [illegible] from a judgment of the city court of Kewanee, ordering him to pay plaintiff, Aletha Reich Abbott, the sum of $ [illegible] per [illegible] support of their minor child, pursuant to the terms of their divorce decree.

The primary issue presented on this appeal is whether the city court erred in refusing to enforce an alleged oral agreement between the parties, modifying the support provisions of the divorce decree.

It appears that plaintiff and defendant were divorced on January 12, 1946. Under the terms of that decree, plaintiff was granted custody of their two children, ages 11 and 7, and defendant was ordered to pay plaintiff $50.00 a month for their support. Defendant complied with the order until January 1, 1947, when the older child came to live with him after he remarried. Defendant thereafter refused to contribute to the support of the younger child who remained in plaintiff's custody and was dependent upon her.

Defendant contends, and plaintiff denies, that the parties entered into an oral agreement proposed by plaintiff, whereby defendant was relieved from making any payments under the decree in return for his assumption of the complete support and maintenance of the older daughter. In corroboration of this assertion, defendant offered an excerpt from a letter written by plaintiff to defendant's mother, stating that defendant had not contributed to the younger child's support, and that plaintiff and her husband did not want him to do so, but sought only to be left alone.

Plaintiff maintains that no such agreement was made, and explains that when the older child wanted to live with her father after he remarried, plaintiff took her there. However, the child did not remain with defendant, but went to live with defendant's mother, and spent the summer and a week at Thanksgiving and at Christmas with plaintiff. She insists, moreover, that nothing was stated concerning a change in the support for the younger child, and that plaintiff made numerous requests for payment from defendant, particularly during their several conversations concerning the adoption of the younger child by plaintiff's husband. Plaintiff insisted that before any adoption proceedings could be undertaken defendant should properly pay the sums he owed for the support of the child.

It appears that plaintiff and defendant were divorced on January 10, 1946. Under the terms of that decree, plaintiff was granted custody of their two children, ages 11 and 7, and defendant was ordered to pay plaintiff $50.00 a month for their support. Defendant complied with the order until January 1, 1947, when the older child came to live with him after he requested. Defendant thereafter refused to contribute to the support of the younger child who remained in plaintiff's custody and was dependent upon her.

Defendant contends, and plaintiff denies, that the parties entered into an oral agreement [illegible] whereby defendant was relieved from making any payments under the decree in return for his assumption of the complete support and maintenance of the older daughter. In corroboration of this assertion, defendant offered in evidence a letter written by plaintiff to defendant's mother, stating that defendant had not contributed to the younger child's support, and that plaintiff and her husband did not want him to do so, but wished only to be left alone.

Plaintiff testified that no such agreement was made, and explained that when the older child went to live with defendant rather than be separated, plaintiff took her sister. However, the child did not remain with defendant, but went to live with defendant's mother, and spent the summer and a week at Christmas giving and at Christmas with plaintiff. The letters, however, that nothing was stated concerning a change in the support for the younger child, and that plaintiff made numerous requests for payment from defendant, particularly during their several conversations concerning the adoption of the younger child by plaintiff's husband. Plaintiff insisted that before any adoption proceedings could be undertaken defendant should properly pay the sums he owed for the support of the child.

In this proceeding to show cause why defendant should not be held in contempt for failure to make the support payments under the decree from January 1, 1947 to January 1, 1949, the chancellor apparently regarded the alleged agreement as of no legal effect. The court, however, took cognizance of the fact that plaintiff had been relieved, for the most part, from supporting the older child for the two year period, during which defendant apparently assumed this burden, and therefore, entered judgment against defendant for $600.00 rather than $1200.00, which would have been the sum due under the terms of the original decree.

Ordinarily, the enforcement by contempt of an order respecting the payment of a child's support by its father is a matter within the sound discretion of the chancellor. (172 A. L. R. 876.) Under some circumstances, a private settlement between the divorced husband and wife, reducing the support payments, has been held to justify a judgment refusing to hold the husband in contempt. (172 A. L. R. 895.) In ascertaining whether the court herein erred in entering the judgment, we shall consider whether any alleged agreement can be inferred from the evidence, and, if so, whether it was binding upon the court or whether its recognition was discretionary, and finally, whether the compromise order constituted an abuse of discretion.

Although the evidence is controverted, it would appear from the conduct of the parties during the two year period in which they each supported one child, and from plaintiff's written admission that she did not care if defendant remained delinquent in his support payments if he would just leave them alone, that some agreement was concluded between the parties.

This tenuous agreement, however, was not incorporated in the decree, and did not appear of record. Plaintiff contends that,

In this proceeding to show cause why defendant should not be held in contempt for failure to make the support payments under the decree from January 1, 1947 to January 1, 1949, the chancellor apparently regarded the alleged agreement as of no legal effect. The court, however, took cognizance of the fact that plaintiff had been relieved, for the most part, from supporting the older child for the two years period, during which defendant apparently assumed this burden, and therefore, entered judgment against defendant for $[illegible].00 rather than $1800.00, which would have been the sum due under the terms of the original decree.

Ordinarily, the enforcement by contempt of an order respecting the payment of a child's support by the father is a matter within the sound discretion of the chancellor. (178 A. L. R. 876.) Under some circumstances, a private settlement between the divorced husband and wife, reducing the support payments, has been held to justify a judgment relieving to hold the husband in contempt. (178 A. L. R. 876.) In accordance, whether the court herein erred in entering the judgment, we shall consider whether any alleged agreement can be inferred from the evidence, and, if so, whether it was binding upon the court or whether the recognition was discretionary, and finally, whether the compromise order constituted an waiver of alimony.

Although the evidence is controverted, it would appear from the conduct of the parties during the two year period in question they each supported one child, and from plaintiff's written admission that she did not care if defendant remained delinquent in his support payments if he would just leave them alone, that some agreement was concluded between the parties.

This tenuous agreement, however, was not incorporated in the decree, and did not appear of record. Plaintiff contends that,

consequently, it was not binding upon the parties or the court, nor determinative of their rights which were governed by the original decree. In support thereof plaintiff cites Walter v. Walter, 189 Ill. App. 345, where the parties made a written agreement releasing defendant from the further payment of alimony in return for his assignment of a life insurance policy and the payment of premiums thereon. The court therein held that inasmuch as the agreement was not of record, it could not be deemed binding, but was subject to the discretion of the court, and the decision of the chancellor therein to disregard the agreement did not constitute an abuse of discretion. The court stated at p. 348:

> "It does not appear that this agreement between the parties was ever brought to the attention of the court, but it seems to have been made without the knowledge or approval of the court, and there is no modification of the original order directing the payment of alimony. . . . We hold that before such an agreement can be binding and conclusive its fairness and equity must be made manifest to the court having jurisdiction, and that its approval must appear of record. . . . It follows, therefore, that it is not sufficient for the immediate parties to agree as to alimony. The approval of the court must also be secured, and by failing to secure this approval the agreement in question was subject to the discretion of the court, to be disregarded or not by it, as it might see fit. We see no abuse of the discretion vested in the chancellor in his choosing to disregard the agreement."

Even if the indefinite oral agreement herein were properly sustained by the evidence, its recognition was purely discretionary, inasmuch as it was not incorporated in the decree or established as a matter of record.

Defendant admits that the alleged oral agreement may not be binding with reference to the future obligations of the parties, but maintains that the court is bound to enforce it so far as their past conduct is concerned, particularly since defendant fully executed his part of the agreement by supporting one child. As authority for this contention, defendant cites two Illinois cases where agreements to modify the alimony provisions of divorce decrees were recognized and enforced by the

visions of divorce decrees were recognized and enforced by the two Illinois cases where agreements to modify the alimony provisions of divorce decrees were not enforced by the defendant fully executed his part of the agreement by supporting one child. In authority for this contention, defendant cites Hallett, 197 Ill. App. 548, where the parties made a written agreement releasing defendant from the further payment of alimony in return for his assignment of a life insurance policy and the payment of premiums thereon. The court merely held that inasmuch as the agreement was not of record, it could not be deemed binding, but was subject to the discretion of the court, and the decision of the chancellor thereto to discharged the agreement did not constitute an abuse of discretion. The court stated at p. 548:

> "It does not appear that this agreement between the parties was ever brought to the attention of the court, nor is there to have been made without the knowledge or approval of the court, and there is no modification of the original order limiting the payment of alimony. . . . We hold that before such an agreement can be binding and conclusive its terms must be and ought to be made manifest to the court having jurisdiction, and that its approval must appear of record. . . . It follows, therefore, that it is not sufficient that the husband is willing to agree as to alimony. The approval of the court must also be secured, and by failing to secure this approval the agreement in question was subject to the discretion of the court, to be disregarded or not by it, as it might see fit. We see no abuse of this discretion vested in our chancellor in his decision to disregard the agreement."

Even if the Hallett agreement herein were properly established by the evidence, its rescindation was purely discretionary, inasmuch as it was not incorporated in the decree or established as a matter of record.

Defendant admits that the alleged oral agreement may not be binding with reference to the future obligations of the parties, but maintains that the court is bound to enforce it so far as their past conduct is concerned, particularly since defendant fully executed his part of the agreement by supporting one child. In authority for this contention, defendant cites

courts. (Cavenaugh v. Cavenaugh, 106 Ill. App. 209; Wolfe v. Wolfe, 303 Ill. App. 188.)

In the Cavenaugh case, supra, the parties concluded a formal contract fixing the alimony at a lesser sum than that designated in the divorce decree. The court stated that this agreement would be recognized as a consent to a reduction in the amount of alimony, rather than as an independent contract relieving defendant of his obligation to pay alimony, and that the court had power to enforce the decree in accordance with any subsequent agreement reducing payments, made by the parties.

A careful reading of this case fails to reveal any authority for the proposition, asserted by defendant herein, that a parent can contract away his duty to support his child, and that by performing the consideration specified in the contract, it becomes ipso facto binding upon the court. The court in the Cavenaugh case merely concluded that it had the power to recognize a written agreement reducing alimony if it chose to do so. Moreover, the court specifically rejected one of the arguments interposed by defendant herein to the effect that, inasmuch as he fully supported one child and probably expended sums in excess of the monthly payment designated in the divorce decree, he should be relieved of any further obligations. The court stated at p. 213:

> "That decree . . . was in full force and effect; and had plaintiff in error wished to be relieved from paying the alimony by reason of his having taken the child, he should have made an application to the court to modify the decree."

In the Wolfe case, supra, relied upon by defendant, the court held that it was unjust to hold the defendant in contempt where the wife had accepted without protest, for five years, a reduction in alimony payments from $15.00 to $12.50 a week under an oral agreement, and where she was relieved of the

courts. (Freeman v. Freeman, 126 Ill. App. 289; Wells v. Wells, 245 Ill. App. 144.)

In the Freeman case, supra, the parties executed a formal contract fixing the alimony at a lesser sum than that designated in the divorce decree. The court stated that such agreement would be considered as a contract to a reduction in the amount of alimony, rather than as an independent contract relieving defendant of his obligation to pay alimony, and that the court had power to enforce the decree in accordance with any subsequent agreement reducing payments, made by the parties.

A careful reading of this case fails to reveal any estoppel by the proposition, accepted by defendant herein, that a person can contractually bind himself to support his wife, and that by performing the contractual modified in the contract, it becomes less readily open to the court. The court in the Freeman case merely declared that it had the power to recognize a written agreement reducing alimony if it chose to do. However, the court specifically refused to enforce the agreement imposed by defendant herein by the effect that, inasmuch as a fully executed and valid contract existed between the parties in the matter of the alimony decree, he should be relieved of any further obligations. The court stated at p. 413:

> "[A]t decree . . . was in full force and effect; and as plaintiff in error wished to be relieved from paying the alimony by reason of his having taken the child, he should have made an application to the court to modify the decree."

In the Life case, supra, relied upon by defendant, the court held that it was not to late to hold the defendant in contempt where the wife had accepted without protest, for five years, a reduction in alimony payments from $15.00 to $12.50 a week under an oral agreement, and where she had relieved of the

support of the child who resided with the grandmother for four years. That decision was predicated upon the laches and acquiescence of the wife, and upon the fact that she had been relieved of maintaining the child as well as the inability of the husband to pay any greater sum as alimony, rather than upon the binding effect of an oral agreement executed by one of the parties.

In the instant case there is no question of defendant's ability to pay; there was no such prolonged period of acquiescence by plaintiff; in fact, there is testimony of plaintiff's repeated requests for overdue payments, and her vehement denial of any agreement to modify the support provisions of the decree; and finally, defendant herein made no payments whatsoever for the two year period during which plaintiff at all times had the burden of supporting their younger child. Thus, it appears that the factors which the court, in the Wolfe case, deemed determinative in warranting the recognition of the agreement to reduce the alimony are conspicuously absent herein, and that that decision can not properly be regarded as a precedent for the instant case.

In analyzing whether the chancellor herein abused his discretion in apparently disregarding the agreement, we shall consider its equitableness and legality. It is evident that the enforcement of the alleged agreement would totally deprive one child of its right to support from her father merely because the father agreed to support the other child. This result would be contrary to sound public policy, as well as to the precepts of the common law which imposes a duty upon a father to support all of his children, irrespective of whether or not they are in his custody. (Plaster v. Plaster, 47 Ill. 290.) A father should not in good conscience be permitted to contract away this obligation, and courts have been reluctant to recognize any agreement between divorced parents which would totally deprive

any agreement between divorced parents which would totally deprive this obligation, and courts have been reluctant to recognize should not in good conscience be permitted to contract away in his custody. (Pleasure v. Pleasure, 47 Ill. App.) A parent of the common law which imposes a duty upon a father to support all of his children, irrespective of whether or not they are the father agrees to support the other child. This result would be contrary to sound public policy, as well as to the precepts one child of its right to support from her father merely because that decision can not properly be regarded as a precedent for the instant case.

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a child of its support. (172 A. L. R. 896 et seq.; Glaze v. Strength, 186 Ga. 613, 198 S.E. 721.)

In Glaze v. Strength, supra, the court stated:

> "Where, as in this case, a jury in the final verdict awards a stated monthly amount for the support of a minor child, to be paid to the wife, and the court so decrees and awards the custody of the child to the wife, the parents themselves cannot by subsequent voluntary settlement in effect nullify or essentially modify the final decree so as to deprive the child of the support to which he is entitled by the verdict and decree."

Defendant argues that the enforcement of the agreement would be equitable, inasmuch as he expended more than the $50.00 a month specified in the decree in supporting the older child, and the imposition of any further payments would be unjust. This contention is without substance, since defendant's total expenditures on behalf of the one child are, at most, conjectural, and his obligation under the divorce decree is to pay plaintiff a designated sum for the support of both children, rather than to provide any particular benefits for one child. This argument was rejected in the Cavenaugh case, and is not supported by the preponderance of judicial authority. (172 A. L. R. 897; Roach v. Oliver, 215 Ia. 800, 244 N.W. 899.)

In the Roach case, supra, the divorce decree granted custody of the children to the mother, and directed the father to pay her $75.00 a month for alimony and support. One of the children resided with the father in the home of the paternal grandparents, where the father paid all of the child's expenses. It was held therein that even though this amount exceeded the amount of the monthly installment owed by the father, a judgment for contempt, for failure to make further payments for the other children, was warranted.

In the case at bar, it is evident from the terms of the decree that the chancellor did take cognizance of the fact that

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Defendant argues that the enforcement of the agreement would be inequitable, inasmuch as he expends more than the $25.00 a month specified in the decree in supporting the older child, and the imposition of any further payments would be unjust. This contention is without merit, since defendant's total expenditures on behalf of the child are, in fact, contemplated by the obligation under the divorce decree to pay plaintiff a designated sum for the support of both children, rather than to provide any particular benefits for one child. This agreement was rejected in the Cavanaugh case, and is not supported by the exponents of judicial authority. (IVP A. L. P. 997; Dixon v. Oliver, 210 Ia. 600, 244 N.W. 920.)

In the Cavanaugh case, supra, the divorce decree required custody of the children to the mother, and directed the father to pay her $15.00 a month for alimony and support. One of the children resided with the father in the home of the paternal grandparents, where the father paid all of the child's expenses. It was held therein that evidence that this amount exceeded the amount of the monthly installment owed by the father, a judgment for contempt, for failure to make further payments for the other children, was warranted.

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defendant expended certain sums on behalf of his older child while she resided with him, and perhaps even while she resided with her grandmother. Or, conversely, the court may have given emphasis to the fact that plaintiff was relieved, for the two year period, of supporting one child, and, therefore, entered judgment against the defendant for half the amount due under the original decree. It is our judgment that this order was a judicious exercise of discretion. The alleged oral agreement was indefinite and controverted, and in derogation of common law precepts, and, therefore, should not have been recognized or enforced. Nevertheless, there had been some modification in the burdens and expenses incurred by the parties, of which the court could, and did, take cognizance by entering this compromise order.

With reference to defendant's allegation that the purported decree dated February 5, 1949, and entered March 26, 1949, was void because of the variance in dates, it is established that the record prima facie imports verity where the court has jurisdiction of the parties and the subject matter. If the incorrect date of the decree were material, application should have been made in the court entering the decree to make the record speak the truth. (Anderson v. Anderson, 380 Ill. 435.) Failure to do so precludes defendant from asserting that variance on appeal. Furthermore, since the judge's minutes of February 5th indicated that the court had determined that the equities were with the plaintiff, these minutes were sufficient to authorize the nunc pro tunc order of March 26, 1949. (Jackman v. North, 398 Ill. 90.) It is evident, therefore, that the date of the decree cannot be deemed reversible error, and the judgment of the city court awarding plaintiff $600.00 for support of the minor child was in accordance with law and should properly be affirmed.

JUDGMENT AFFIRMED.

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With reference to defendant's allegation that the purported decree dated February 5, 1948, and entered March 20, 1948, was void because of the variance in dates, it is established that the record plus facts imparted verbally where the court has jurisdiction of the parties and the subject matter. If the incorrect date of the decree were material, application should have been made in the court entering the decree to make the record speak the truth. (Anderson v. Anderson, 300 Ill. 433.) Failure to do so precludes defendant from asserting that variance on appeal. Furthermore, since the judge's minutes of February 5th indicated that the court had determined that the equities were with the plaintiff, these minutes were sufficient to authorize the nunc pro tunc order of March 26, 1948. (Jackman v. North, 333 Ill. 90.) It is evident, therefore, that the date of the decree cannot be deemed reversible error, and the judgment of the city court awarding plaintiff $50.00 for support of the minor child was in accordance with law and should properly be affirmed.

JUDGMENT AFFIRMED.

Abstract

Gen. No. 10362. Agenda No. 10.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

MAY TERM, A. D. 1949.

JAMES MILLER, Claimant-Appellee,

vs.

GENEVA A. MILLER, Defendant-Appellant.

Appeal from the County Court of Kankakee County.

340 I.A. 639

PER CURIAM.

On July 19, 1948, Geneva A. Miller procured a divorce from Robert H. Miller in the Circuit Court of Kankakee County, Illinois. Alimony was provided in the decree of divorce, which Robert H. Miller failed to pay and Geneva A. Miller procured a judgment against him for the amount of the back alimony. An execution was issued on this judgment and delivered to the sheriff on September 7, 1948, at 3:00 P.M. He, through his deputy, levied on a Studebaker Truck valued at $1500.00. James Miller, a brother of Robert H. Miller, instituted a proceeding in the County Court of Kankakee County, to determine the ownership of the truck in question. The Court tried the case without a jury and found the issues in favor of the claimant, James Miller. Geneva A. Miller has perfected an appeal to this Court.

It is claimed that the Court erred in failing to hold that the sale of the truck to James Miller by Robert H. Miller, was void as to the defendant under Chapter 59, Section 4, Illinois

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It is claimed that the Court erred in failing to hold that the sale of the truck to James Miller by Robert H. Miller, was void as to the defendant under Chapter 59, Section 4, Illinois

Revised 1947 Statute, and in failing to hold the sale to claimant, James Miller by Robert H. Miller, was void as to the defendant under Chapter 121½ Section 46, Illinois Revised Statute 1947, and that the judgment was against the manifest weight of the evidence.

The evidence shows that Robert H. Miller had formerly been engaged in the tiletex and marble business in Kankakee County, Illinois; that he sold part of his business to Louis J. Corrigan and the other part to Robert Adame; that Robert H. Miller was the owner of a Studebaker pickup truck, which he used in his business; that he sold this truck to his brother, James Miller, but reserved the use of it for a short time for Corrigan and Adame. This sale was made on August 24, 1948. There was a $1,000.00 mortgage on the truck, owned by one, W. P. Beckers. Mr. Beckers testified that James Miller came to him with a certificate of title to the Studebaker truck and paid him $1,000.00 cash on the mortgage note, which he then marked paid, and returned the note and mortgage to James A. Miller. The cancelled note and mortgage were introduced in evidence and endorsed on the note and mortgage "James Miller paid $1,000.00 on August 24, 1948."

James Miller, the claimant, testified that he bought this truck from his brother, Robert, on August 24, 1948; that he paid $1500.00 for it; $500.00 cash and paid the mortgage of $1,000.00; that he received a certificate of title the same date. The only evidence to the contrary is by Wayne H. Dyer, defendant's attorney, who says that James Miller called at his office in regard to the suit and that Miller told him at that time that he had not paid for it, also stated that he did not have the title. James Miller on rebuttal, denied ever making such statement, but did say that he did not have the title

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with him at the time that he visited Mr. Dyer's office.

Robert Windmiller testified that he had been working for Robert H. Miller the last days of August, or the 2nd or 3rd day of September, and Mr. Adame worked with him, and he knew that at that time that James Miller had bought the truck, and that the truck had been delivered to James Miller on Friday, which was before the judgment and the execution were issued.

Robert Adame testified that he had worked with Robert H. Miller for three years and was working with him on September 7, 1948; that he had been using the truck in his business since August the 24th and was paying rent on the truck to James Miller according to the mileage that was used; that they were just cleaning up jobs that Robert Miller had; that he delivered the truck to James Miller on Friday night, a week and one-half before it was levied on. In his best judgment it was on September the 1st. The only evidence to show that this was not a bona fide sale is what the witness, Dyer, said James Miller had told him about the transaction in his office.

It is insisted by the appellants that this sale was fraudulent, in an attempt to defraud Robert H. Miller's creditors. Fraud is never presumed, but must be proven by clear and convincing evidence. A mere suspicion of fraud is not sufficient. The evidence must be clear and cogent and must leave the mind well satisfied that the allegations of fraud are true. In the present case there are no written pleadings so that in order to sustain the charge of fraud, it must appear from the evidence alone. If this transaction had been between strangers, there could be no question but that it was a bona fide sale, but here it is between brothers,

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and it might be argued that there was some suspicious circumstances of fraud, still it must be shown from the evidence that the transfer was really made for a fraudulent purpose, and if the evidence does not so show, then neither section of the statute relied upon by the appellant would have any application to the facts in this case. The trial court was in a better position than a Court of review to pass upon the credibility of the witnesses. He has seen fit to give credence to the claimant's witnesses' testimony. From a reading of the evidence as abstracted, it is our conclusion that the evidence fully sustains the finding of the trial court, and the judgment therefore should be affirmed.

Judgment affirmed.

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Judgment affirmed.

44806

JOHN F. HACK and ROBERT HACK, a minor, by JOHN F. HACK, his father and next friend, Appellants,

v.

MARTIN LANGE, LEROY W. HAVLING and DANIEL G. MOHR, Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

340 I.A. 640

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

This cause comes here from the Superior Court of Cook County on an appeal by John F. Hack and Robert A. Hack, a minor, plaintiffs below, from a judgment entered upon the verdict of a jury finding the defendants Martin Lange, LeRoy W. Havling and Daniel G. Mohr not guilty, and special verdicts of the jury finding defendants Havling and Mohr were not acting as servants or agents of defendant Lange at and prior to the time of the accident.

The plaintiffs claim to have been injured as a result of a collision between a car driven by plaintiff John F. Hack, accompanied by his minor son Robert A. Hack, and a car owned by defendant Martin Lange and driven by defendant Daniel G. Mohr, who was accompanied by defendant LeRoy W. Havling. Hack, a sales engineer residing in Lansing, Illinois, having done some shopping in Lansing, was driving his Nash automobile homeward in the early afternoon of October 19, 1946. He was driving eastward on a public highway known as Ridge road. Ridge

road is a four-lane street paved with concrete, having two lanes for eastbound traffic and two lanes for westbound traffic, and is approximately 48 to 60 feet wide with a line painted down the center. It was a sunshiny day, visibility was good and pavement dry. Hack proceeded eastward in the outer right-hand lane in Ridge road to a point about 100 feet west of a highway known as School street when he turned into the inner right-hand lane to pass a car parked along the south curb. He was traveling about 25 miles an hour and there was no traffic eastbound on Ridge road preceding him. Defendant Mohr, driving Langes' Ford automobile, came west on Ridge road toward School street following a Buick automobile proceeding in the same direction, the Buick traveling about 25 miles an hour. He had been following the Buick for several blocks. Mohr testified that at School street he was "pretty close to 50 feet" behind the Buick when the Buick came to a sudden stop, for the purpose of making a left turn, giving no warning or signal whatsoever of an intention to stop or to turn. To avoid striking the Buick he claimed that he swerved his Ford car to the right, but was unable to pass by virtue of a parked car, and then swerved quickly to the left into the lane of traffic in which plaintiffs were traveling, and the collision thereupon occurred. He testified that when his automobile got over the left side of the center of the road that he then for the first time saw plaintiffs' automobile. Plaintiffs' automobile was

then in the inner lane of the south side of the road (pretty close to the center), and the left front of the defendants' automobile struck the left front of plaintiffs' automobile.

The principal point of dispute arising from the evidence is whether or not the Buick car, driven by the witness Terpstra, came to a stop at the intersection of School street and Ridge road and whether he gave any signal of an intention to turn. Terpstra testified substantially that he was driving a Pontiac car (though all other witnesses refer to it as a Buick) and observed the Ford in the rearview mirror when it was two blocks back of him; that some distance before reaching School street he put on his signal light which caused a light to flicker on his left front fender and also on the rear above his tail light indicating a left-hand turn; that he decreased his speed to about 20 miles an hour and turned left into School street in back of plaintiffs' automobile; that he did not stop his automobile before he came to School street. He testified that he had been driving about 25 miles an hour and as he turned left he decreased his speed to about 20 miles an hour. Two boys, Donald Staack, 15, and Willis G. Imes, testified as to the point where the accident occurred, and both testified that they did not see any lights flash on the "Buick" or hear any horn or screeching of brakes. Defendants Havling and Mohr both testified that the "Buick" turned without warning

and without signal. The witness Mohr, called under Section 60, was confronted with a signed statement made three days after the accident and admitted that "I might have told the man that the Ford ran good, but that the brakes weren't so good," and that "I might have told him that I was fifty to eighty feet from the Buick when the driver put on the brakes." Plaintiff John F. Hack corroborated the witness Terpstra to the effect that the "Buick" automobile was traveling about 25 miles an hour and was slowing down as it approached School street, and testified that at no time while it was in his line of vision did it stop; that he did not see the Ford automobile of the defendants until he came abreast of the westbound "Buick" automobile, when the Ford automobile suddenly and without warning turned out from behind the "Buick" automobile and into the automobile of the plaintiff. Plaintiff does not testify that Terpstra indicated, by lights or otherwise, his intention to turn.

The plaintiffs' position may be summarized from a statement in the brief, "The very fact that defendants had to swerve their automobile to the right and then to the left to avoid collision with the automobile preceding them, we submit conclusively proves that defendants' automobile was driven too close to the car ahead or that defendants were operating their automobile with defective brakes inadequate to control its movements." We cannot agree with this contention of plaintiffs. We feel that

under all the facts and circumstances in the case it was a question of fact for the jury. There was evidence which, if believed, would establish that the Ford automobile was being driven without negligence and that, confronted with a sudden emergency, namely, Terpstra's sudden left turn without signaling his intention, Mohr acted with such care as the law required under the circumstances.

Plaintiffs cite a number of cases where, under certain circumstances, it has been held negligence as a matter of law to follow so closely behind a preceding car as to be unable to stop in an emergency. We are of the opinion that the cases cited by plaintiffs may all be distinguished on the facts. In the case of Starr v. Rossin, 302 Ill. App. 325, in considering a similar question, the court said at page 330:

"Defendant has likewise contended that the plaintiffs violated section 61 (a) of the Uniform Act regulating Traffic on Highways [Ill. Rev. Stat. 1937, ch. 95-1/2, par. 158; Jones Ill. Rev. Stats. 85.190] of the State of Illinois, in that the car in which plaintiffs were riding was following defendant's car more closely than was reasonable and prudent having due regard for the speed of the vehicles. It should be readily apparent that (as has been indicated above in this opinion) this court cannot arbitrarily say that any of the plaintiffs were guilty of contributory negligence by virtue of the fact that the automobile in which they were riding, or driving, was within 35 or 48 feet of that of defendant. The question was one for the jury under all the facts and circumstances. No arbitrary rule, under such circumstances, can be fixed by the court, nor, under the circumstances, can the plaintiffs be charged with the duty to anticipate any violation of law by the defendant, which might cause such collision as occurred in the instant case (Trout Auto Livery Co. v. People's Gas Light & Coke Co., 168

Ill. App. 56, 59; Kilroy v. Justrite Mfg. Co., 209 Ill. App. 499."

Complaint is made that error was committed in permitting plaintiff John F. Hack to be questioned as to whether or not he received his salary while home from work. While it is ordinarily true that no injustice is done a person negligently injuring another to require him to pay the full amount of damages for which he is legally liable without reduction for compensation which the injured person may receive from another source which has no connection with the negligence, a somewhat different question was presented by the evidence here. Defendants contend that the nature of plaintiff's employment was such that he was able to carry it on, at least partially, from his home and that he did so act during a portion of the disability period. As a circumstance bearing on that point he was permitted to show the payment of salary by his employer. In any event, as we view the evidence here, the question of this payment would merely go to the question of damages, and inasmuch as the jury found no liability on the part of the defendants, the question becomes immaterial.

Complaint is made about the giving of certain instructions. We have carefully examined the instructions and are of the opinion that the criticism is not justified. Plaintiffs complain of the refusal to give the following instruction:

"The degree of proof required of the plaintiffs is that they prove their respective cases by a preponderance of the evidence. This means that upon the questions of fact which the plaintiffs are required to prove they must have a greater weight or preponderance of evidence. But this rule does not require the plaintiffs to prove any fact beyond a reasonable doubt; a fact is sufficiently proved if the jury find the preponderance or greater weight of the evidence in their favor."

We do not agree with plaintiffs' criticism. Five instructions tendered by the defendants used the expression "preponderance" or "greater weight" of the evidence. The jury were given one clear instruction on preponderance of the evidence. We do not believe, under the circumstances, that the instruction tendered would have been of further assistance in defining the term "preponderance."

In view of our holding it is not necessary to consider the assignment of error that the special verdicts and the judgment of the court finding that defendants Havling and Mohr were not at the time of the accident acting as servants or agents of the defendant Lange. Inasmuch as Lange could only be found guilty, if at all, on the theory of respondeat superior, the agents having been found free from negligence, the principal by such finding is also absolved.

Accordingly, the judgment of the Superior Court of Cook County is affirmed.

Judgment affirmed.

Niemeyer and Feinberg, JJ., concur.

44937

VIRGINIA PRICE and JOSEPHINE PRICE ELLIS, Appellants,	)	APPEAL FROM SUPERIOR
v.	)	COURT, COOK COUNTY.
LENN McCowan et al., Appellees.	)	340 I.A. 640

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from an order dismissing their complaint filed August 29, 1946, being a complaint to review a decree entered on October 7, 1943.

The decree was entered in a proceeding brought by the present defendants against the plaintiffs in the instant suit, to remove a cloud upon their title to real estate, alleging among other things that the deeds of record were forged instruments. In the original proceeding in which the decree was entered, a petition for a change of venue was presented by the defendants in that suit, which petition was denied by the chancellor who entered the decree. An appeal was taken from the order denying the petition for change of venue, and the appeal was dismissed in this court for the obvious reason that it was not an appealable order. McCowan v. Ellis, 323 Ill. App. 291.

The only question presented upon this appeal which we need consider is whether a bill of review will lie to review a decree entered three years previously for an alleged error in the denial of the

petition for a change of venue, that being the only error of law relied upon for the right to maintain the instant bill of review.

In Ullrich v. Ullrich, 299 Ill. App. 460, this court had occasion to review the authorities touching upon the question as to when a bill of review will lie to correct an error of law apparent upon the final decree or judgment. The authorities there cited, beginning with Griggs v. Gear, 3 Gilman (Ill.) 2, to Regner v. Hoover, 318 Ill. 169, all hold the error of law must appear from the decree or judgment, which would justify the right to a bill of review.

The order denying a petition for a change of venue was not a final order, judgment or decree. The court had the right to pass upon the sufficiency of the petition for a change of venue, whether it was presented in apt time, or whether anything occurred in the proceedings before the court which constituted a waiver of the right to the change of venue, none of which matters are properly before us upon this record. Phillips v. O'Connell, 331 Ill. App. 511, 527; Commissioners of Drainage Dist. v. Goembel, 383 Ill. 323, 328. The correctness of the court's ruling should have been preserved for review on appeal from the final decree in the original proceeding, and the bill of review cannot be made to perform the function of an

appeal or writ of error. Ullrich v. Ullrich, supra, and cases there cited.

The court was correct in dismissing this complaint, and accordingly the order appealed from is affirmed.

Order affirmed.

Niemeyer and Feinberg, JJ., concur.

44976

In the Matter of the Estate of Emil Richard Conrad, Deceased.	
LENA CONRAD, Appellee, v. ERVIN A. PAHLKE, as Executor of the Estate of Emil Richard Conrad, Deceased, Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

340 I.A. 641

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff Lena Conrad filed her claim in the Probate Court of Cook County against defendant Ervin A. Pahlke, as executor of the estate of Emil Richard Conrad, deceased, for the sum of $12,432.22 alleged to be due under the terms of a separate maintenance decree and a divorce decree entered some years before. The claim was allowed as a 7th class claim in the Probate Court and later was heard de novo on appeal to the Circuit Court of Cook County where, after trial without a jury, judgment for the sum of $11,976.75, was entered, being the amount found due under the decrees.

Plaintiff contends that her proof in the case established an indebtedness from decedent to the plaintiff and an obligation to pay the same, and that the burden of proving payment, the defense upon which defendant relied, was on him.

The evidence establishes that in the early part of February, 1926, plaintiff filed her complaint for

separate maintenance in the Superior Court of Cook County; that on February 15, 1926, an order directing Conrad to pay alimony and support money was entered; that on April 14, 1926, plaintiff filed a petition for a rule to show cause why Conrad should not be punished for contempt for failure to comply with the alimony provisions in the order; that on June 15th and on June 30th additional petitions for rules were filed, Conrad in the meantime having been ordered committed; that on August 6th an attachment order was entered for Conrad; that on December 18, 1931, plaintiff filed another petition for a rule alleging that the defendant had been out of the jurisdiction and that there was due to her the sum of $4,945; that on April 23, 1932, a separate maintenance decree was entered fixing the amounts due from Conrad to plaintiff for temporary alimony, child support and attorney's fees in the sum of $5,215, plus an additional $100 as final solicitor's fees; that there was also an order entered for child support in the amount of $35 a month commencing April 23, 1932; and that thereafter, on June 6, 1933, in the Circuit Court of Cook County, Illinois, a divorce decree was entered in favor of plaintiff against Conrad, the pertinent part of which provided:

> "It is further ordered, adjudged and decreed, and the Court by virtue of the power and authority therein vested, and the statute in such case made and provided, doth order, adjudge and decree that Richard Conrad, the defendant, pay to the order of Lena Conrad, the complainant herein, the sum of Thirty-five Dollars ($35.00) on the first day of each and every month hereafter for the support, maintenance and education of Charlotte Conrad, the minor daughter of the parties hereto, said payments to continue until said Charlotte Conrad shall arrive at the age of eighteen (18) years or until further order of the court."

The evidence in the case was entirely documentary, consisting of the separate maintenance decree entered April 23, 1932, a certificate of evidence supporting the separate maintenance decree, the divorce decree entered June 6, 1933, the certificate of evidence supporting the divorce decree, and petitions and orders in the separate maintenance suit. These documents having been received in evidence, plaintiff rested.

Defendant argues that the burden of proving plaintiff's claim was upon her and that the mere introduction in evidence of these documents was insufficient to prove her claim.

While the state of the record would be more satisfactory if the testimony of the plaintiff and the decedent as to the controverted fact of payment could have been received, the court was deprived of their testimony by virtue of the statutory disqualification of the plaintiff and the death of the decedent. It is our opinion, however, that by the introduction of the separate maintenance and divorce decrees the plaintiff established prima facie a legal obligation of the decedent to pay the claimant the sums of money therein specified. In In re Estate of Kossuth H. Bell, 210 Ill. App. 350, decided by this court, a claim based upon an order for temporary alimony was filed against the estate of the deceased husband. In passing upon a question similar to the one before us the court said (p. 355):

> "The evidence in the record is amply sufficient to support the judgment if, as matter of law under the facts, a recovery can be had. The evidence proffered by the claimant consisted of copies of the

> order for alimony appealed from, the appeal bond given on that appeal, the opinion and judgment of this court on the appeal,and the bill of costs of this court in the appeal case. This was sufficient to make a prima facie case for claimant."

Defendant urged that the long intervening period during which plaintiff made no attempt to collect the arrears in alimony and support money, together with evidence of payment of certain items in her claim and also the conduct of the plaintiff with respect to her efforts to collect arrears and alimony in the Superior and Circuit courts, raises a presumption of payment by the decedent. Defendant recognizes that nothing less than a lapse of 20 years, independent of the statute of limitations, will ordinarily raise a presumption of payment, but argues that where the past conduct and acts of a claimant are inconsistent with nonpayment a lesser lapse of time will suffice to raise the presumption of payment, and the stronger the facts and the longer the lapse of time the stronger the presumption becomes. With the many cases cited in support of this principle we need not immediately concern ourselves for the reason that we do not consider the facts in the instant case sufficient to presumptively overcome the strong prima facie case showing the existence of the obligation. To hold that, because after a certain period of time no steps were taken to attempt to enforce judgments which had been vigorously prosecuted during a preceding period, a clear presumption of payment is created, would be stretching the law of presumption to unwarranted lengths. Any attempt to find reasons why no court action was undertaken by plaintiff, under the circumstances here shown, to collect

a debt admittedly owed at one time leads only to speculation and conjecture.

An examination of the record disputes the contention of the defendant that the decree of separate maintenance is void in that there is no finding that plaintiff was living separate and apart from defendant without her fault. We think the record affirmatively shows that the court had jurisdiction of the parties to the proceeding and that plaintiff was living separate and apart from defendant without her fault, and we find no merit in the further contention that the subsequent decree of divorce extinguished the interest of plaintiff in the support money awarded by the separate maintenance decree.

Therefore the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

NIEMEYER AND FEINBERG, JJ. CONCUR.

45000
45001

J. D. JONES, Appellant,	)	
45000 v.	)	APPEAL FROM
ISABELLA JONES, Appellee.	)	SUPERIOR COURT
	)	COOK COUNTY
ISABELLA S. JONES, Appellee,	)	
45001 v.	)	APPEAL FROM
J. D. JONES, Appellant.	)	SUPERIOR COURT
	)	COOK COUNTY

340 I.A. 341

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

On April 11, 1949, plaintiff J. D. Jones filed his complaint in the nature of a bill of review to vacate a decree of divorce entered on November 21, 1947. From an order dismissing the complaint to vacate the decree for divorce for want of equity, plaintiff appeals in the cause here designated as No. 45000. Subsequent to the entry of the decree for divorce below in the case entitled Isabella S. Jones v. J. D. Jones, an order was entered on the defendant to pay the sum of $500 as attorneys' fees to the solicitors for the plaintiff, and another order was entered committing defendant for contempt of court in failing to pay money ordered to be paid to the plaintiff under said decree of divorce which was entered on November 21, 1947. From these orders the defendant J. D. Jones has appealed, and said cause

is designated here as No. 45001. Inasmuch as both actions arise out of the same subject matter they have here been consolidated.

The principal contention urged by Jones in his complaint, which is in the nature of a bill of review, is that the decree of divorce was entered without a trial and without a proper disposition of the pleadings. A fatal objection to Jones' right to have a review of this decree arises from the fact that the complaint here under consideration was not filed in apt time. The decree for divorce was entered on November 21, 1947. The bill which sought a review of these proceedings was not filed until April 11, 1949, approximately seventeen months after the entry of the decree. That the plaintiff knew in November of 1947 of the entry of the decree appears from the complaint and from his own testimony in the record. It is well established in this State that a bill of review or a bill in the nature of a bill of review can be brought only within the time allowed for perfecting an appeal or suing out a writ of error. Knaus v. Chicago Title and Trust Co., 365 Ill. 588. Section 76 of the Civil Practice Act, (Ill. Rev. Stat. 1947, chap. 110, par. 200,) in force at the time the divorce decree was entered, limits the time within which an appeal may be perfected, as a matter of right, to ninety days, and, upon leave granted, to one year after the entry of the decree. If the complaint be deemed a bill of review, it was not filed in apt time. Ward v. Sampson, 395 Ill. 353, 359.

Aside from the fact that the bill was not filed in apt time, we find no merit in the contentions raised by J. D. Jones to the effect that the divorce was entered without a trial and without the proof required by the Divorce Act. The divorce decree recites that it was entered after a hearing on the merits and sets forth in detail specific findings based on the evidence. No valid reason is assigned here as to why we should look behind the decree. No challenge to the jurisdiction is urged, and it appears that after the evidence was heard and the decree prepared, the decree was approved by the then attorney for J. D. Jones. No proper subject matter for review is presented by this appeal.

The record recites that "the court finds from the evidence the respondent J. D. Jones is able to comply with the decree; that his refusal is wilful, therefore he is in contempt of this court for failure to pay $950.00." We have reviewed the evidence and we feel that the trial court's finding is not against the manifest weight of the evidence in finding J. D. Jones guilty of contempt. Neither are we disposed to interfere with the trial court's finding as to attorneys' fees.

Accordingly, the judgment orders of the Superior Court of Cook County are affirmed.

AFFIRMED.

Niemeyer and Feinberg, JJ., concur.

45009

ALBERT PAPPA, Appellee, v. DAVID ZATZ, Appellant.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

340 I.A. 642

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for possession entered August 18, 1949, in favor of plaintiff, in a case tried without a jury.

Defendant was in possession of premises consisting of approximately 247 square feet of space in the center of the first floor lobby of the building known as 160 North La Salle Street, Chicago, used as a cigar stand. He held possession under a lease from the Court's Building Corporation dated March 22, 1945, for a term commencing the first day of May, 1945, and ending on the thirtieth day of April, 1950, for a total rental of $15,000 payable in sixty installments of $250 each. Notice of termination of this lease was served upon the defendant January 23, 1947, by Chicago Title and Trust Company, as trustee, the notice reciting that the latter had acquired title on October 17, 1946, by conveyance from Courts Building Corporation. Plaintiff claimed possession by virtue of a lease dated January 3, 1949, from the State of Illinois, for whom he asserts the Chicago Title and Trust Company held title, purporting to be signed by one Mark A. Saunders, Director of Finance of the State of Illinois, leasing the premises to him for a period of two years commencing January 1, 1949.

Plaintiff contends that under the provisions of clause 9 of the lease the right was reserved to the lessor to cancel on the 30th day of April in any year subsequent to the first, provided notice be given to the lessee in conformity with the terms of the lease, and that the Chicago Title and Trust Company, which succeeded to the rights of the original lessor, effected a cancellation by the notice of January 23, 1947.

Defendant contends that the cancellation clause in the March lease had been physically deleted by agreement prior to the delivery of said lease by the lessor to defendant. Plaintiff contends that the cancellation clause had not been stricken at the time of the delivery of the instrument.

Plaintiff failed to produce the lessor's copy of the lease between the Courts Building Corporation and defendant. To prove his case plaintiff called upon defendant to produce defendant's copy of the lease, which showed the cancellation clause therein stricken out. Over objection, the testimony of a witness as to examination of the lessor's copy of the lease made on two occasions was allowed, which examination disclosed that the cancellation clause, paragraph 9, had not been stricken and that paragraph 9 had not been X-ed out in whole or in part in the lessor's copy. The witness by whom it was sought to establish these facts was testifying as to his recollection of what appeared in a document that he had inspected some two years before. In order to render secondary evidence of this character competent, proper foundation was required by showing good and sufficient

reasons for the failure to produce the writing. Competent proof to this effect was not forthcoming. The fact that much incompetent testimony attempting to account for the absent document was adduced by improper questions of the trial judge in no wise lessened its prejudicial effect. 58 Am. Jur., Witnesses, Sec. 557. The burden in this case of establishing the right to possession against defendant who was in possession was upon the plaintiff. Fitzgerald v. Quinn, 165 Ill. 354. No such prima facie case was made. Furthermore, insofar as he relied on a document bearing alterations on its face, the burden was upon him to explain the alterations. Ruwaldt v. McBride, Inc., 388 Ill. 285; Gage v. City of Chicago, 225 Ill. 218.

Moreover, we think that the defendant, forced by the erroneous rulings of the trial court to assume a burden not properly his, established by a preponderance of the evidence that the cancellation clause in the altered lease had been stricken at the time the lease was delivered to him. He testified that for about two and one-half years he occupied a six by six stand in the premises; that he desired to erect a larger stand which would require an investment on his part of about $20,000; that he discussed the matter with the president of the lessor corporation and told him that if he, the defendant, could obtain a new five-year lease without a cancellation clause, he would erect a new stand and personally bear the entire construction cost of $20,000; that this was approved and the defendant actually spent $19,500 to erect a new stand, to which the lessor

contributed nothing; that when the lessor's copy of the lease was delivered to the defendant by the president of the lessor corporation, the latter said, "I have your lease returned to you with the cancellation clause stricken out." This testimony is corroborated by a brother of the defendant and is not disputed by any evidence offered on behalf of plaintiff. The defendant was further corroborated by the fact that the lease upon which the plaintiff relies carries a rider making it expressly subject to the rights of the defendant under the terms and provisions of the defendant's lease from the Courts Building Corporation.

Plaintiff's claim of right to possession herein is based upon a purported lease from the State of Illinois bearing a typed date of January 3, 1949. There is no evidence that the State then had title to the premises or ever had been in possession. The evidence was undisputed that the defendant had operated the cigar stand on the premises for about seven years, had constructed the present cigar stand in 1945 and had been in peaceful possession of it thereafter. No title documents were offered in evidence showing title either in the State of Illinois, or the Chicago Title and Trust Company, the party in whose name the notice of termination was served. Plaintiff himself testified that he never read his alleged lease; that he does not know who Saunders is; that he does not remember when the signature of Saunders was placed on the lease; that he did not examine or read the lease before he signed it; that he did not know

what the rent was; that he had never paid any rent to the State of Illinois. Even though it be presumed that Saunders executed the lease on behalf of the State of Illinois, there was no evidence that Saunders was at such time the Director of Finance or had any authority to execute such a lease on behalf of the State of Illinois. The absence of this proof is fatal to plaintiff's claim. Layzod v. Martin, 305 Ill. App. 1; Brunton v. Habel, 333 Ill. App. 333.

Much additional improper evidence was admitted and proper evidence rejected; however, we deem it unnecessary to consider further error. There was a complete absence of any competent proof of plaintiff's right to possession of the premises.

Accordingly, the judgment of the Municipal Court of Chicago is reversed.

REVERSED.

NIEMEYER AND FEINBERG, JJ. CONCUR.

44954

JOHN BALASKAS and HENRY THOMAS,
Appellees,

v.

VICTOR S. PETERS,
Appellant.

ANDERSON PLÓTZ & COMPANY, INC., a corporation,
Intervening Petitioner and Counter Claimant,
Appellee,

v.

VICTOR S. PETERS,
Appellant,

JOHN BALASKAS and HENRY THOMAS,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

340 I.A. 643

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree entered in the Circuit Court of Cook County upon the filing of the mandate of this court issued upon a former appeal in Balaskas v. Peters, 335 Ill. App. 565 (Abst.), and complains that the chancellor erred in that portion of the instant decree which taxed certain costs against him. The provision of the decree complained of is: "It is further ordered, adjudged and decreed that the defendant, Victor S. Peters, pay all the costs of this proceeding; and it appearing to the Court that plaintiffs, John Balaskas and Henry Thomas, have paid the said Master's fee of One Thousand Three Hundred Thirteen and 25/100 ($1,313.25) Dollars, it is hereby ordered that the plaintiffs, John Balaskas and Henry Thomas, have and recover from the said

Victor S. Peters, Thirteen Hundred Thirteen and 25/100 Dollars ($1313.25) and that execution issue therefore."

Plaintiffs filed their complaint against defendant for specific performance, involving certain marketable securities. Anderson Plotz & Company, Inc., intervened, claiming it was entitled to specific performance against defendant concerning the same securities. Upon a final hearing, the Circuit Court entered a decree, granting specific performance to plaintiffs, finding in that decree that plaintiffs had paid the master's fees amounting to $1313.25 and taxing the same as costs against defendant. Defendant did not appeal from that decree, but the intervenor did appeal. We held that the intervenor was not only a party of record but one directly affected by the decree and had a right to appeal. That decree was reversed by this court and remanded with directions to enter a decree for specific performance in favor of the intervenor in accordance with the views expressed in our opinion. The mandate issued out of this court to the Circuit Court directed that "the decree of the Circuit Court of Cook County, in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the Circuit Court of Cook County with directions to said Circuit Court to enter a decree for the intervening petitioner in harmony with the views expressed in the opinion of this Court this day filed herein." Following the filing of the mandate the Circuit Court entered the instant decree, which vacated, annulled and set aside the former decree referred to.

It is contended by plaintiffs that because defendant did not appeal from the original decree, he cannot now be heard to complain as to the fees taxed as costs against him by the chancellor, and that the chancellor had the discretion to do so under sec. 18, ch. 33, Ill. Rev. Stat. 1949. The fact that defendant did not appeal does not change the legal effect of the reversal of the decree by this court, where the net result is that plaintiffs' complaint is dismissed for want of equity. There are cases involving special circumstances where the chancellor, under the statute referred to, has the discretion to tax costs, Drexel State Bank v. O'Donnell, 344 Ill. 173, but we do not regard the instant case as one involving such special circumstances. The costs incurred before the master were the result of the filing of the complaint, which was found to be without equity. We see no equitable reason presented by the records in the original appeal or upon the present appeal that would justify taxing the fees of the master against defendant and in favor of plaintiffs.

For the reasons indicated, that portion of the instant decree taxing the master's fees as costs against defendant, in favor of plaintiffs, is reversed, and the balance of the decree is affirmed and the cause remanded with directions to tax the costs of the intervenor against the plaintiffs.

AFFIRMED IN PART AND REVERSED IN PART AND REMANDED.

Tuchy, P. J., and Niemeyer, J., concur.

44963

SEARLE & FUNDERBURG, INC., an Illinois corporation,
Appellant,

v.

FUHREMANN CANNING COMPANY, a Wisconsin corporation duly licensed to do business in Illinois,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

340 I.A. 243

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

This appeal is from a partial summary judgment in an action for commissions claimed by plaintiff, arising out of an alleged contract of employment by defendant to sell two of defendant's canning plants, owned and operated by defendant in Wisconsin.

The amended complaint alleged in substance that defendant employed plaintiff to find a purchaser for all or a portion of the canning plants owned by defendant; that defendant agreed to pay plaintiff 5% of the aggregate sales price, whether the sale was for cash or securities or both; that pursuant to said employment plaintiff procured a purchaser for said canning plants; that defendant entered into negotiations with said purchaser, aided by plaintiff, which resulted in a contract of sale between defendant and said purchaser for $550,000; that neither at the time of entering into the contract nor the time of its performance or consummation was plaintiff engaged in the business of real estate broker or salesman in Illinois or elsewhere, and neither was it engaged in the

business of selling canning plants in Illinois or elsewhere, either as broker, agent or principal, and that the service rendered by plaintiff was the only transaction of its character entered into and was an isolated transaction not requiring the licensing of plaintiff as a broker in real estate or canning plants.

The answer denied the contract of employment, and alleged that it had no knowledge sufficient to form a belief as to whether plaintiff contacted the purchaser in question or induced said purchaser to purchase, and therefore neither admits nor denies the same but demands strict proof thereof. It alleged the affirmative defense that plaintiff was not a licensed broker or dealer in real estate or canning plants, and that plaintiff's failure to be so licensed barred its claim to recover.

Defendant made its motion for summary judgment supported by affidavits, which alleged in substance that the employment alleged in plaintiff's amended complaint included the sale of real estate, and that said contract of employment was in violation of the Illinois Revised Statutes, Ch. 114-1/2, §1, and the Municipal Code of Chicago, Ch. 113, requiring real estate brokers and salesmen to be licensed; that plaintiff was at no time licensed to engage in business as a real estate broker or real estate salesman, nor to engage in the business of selling canning plants; that the canning plants referred to were located in Berlin and Appleton, Wisconsin; that said plants consisted of defendant's land and buildings together with machinery and equipment permanently attached thereto and being a part of said real estate; that of the total sales

price--namely, $550,000--less than 5% thereof was for personal property and 95% thereof for land and buildings, and machinery and equipment permanently attached thereto.

The motion for summary judgment was countered by reply and counter-affidavits, which in substance alleged that at no time had plaintiff ever acted as a real estate broker or real estate salesman within the meaning of the statute, nor ever acted as a broker as defined by the Municipal Code of Chicago; that when plaintiff was employed by defendant it was not advised by defendant that said plants to be sold included real estate owned by defendant or whether the sale of the canning properties was to be effected by the sale of the corporate stock of defendant; that defendant furnished to plaintiff, to be submitted to the purchaser, data and information relating to the operation of the business conducted by defendant at Berlin and Appleton, Wisconsin, and financial data relating thereto, but that none of it included any break-down regarding real estate, lands, buildings or appurtenances; that more than 70% of the value of the canning plants operated by defendant at Berlin and Appleton, Wisconsin, consisted of personal property, and less than 30% of the value consisted of real estate.

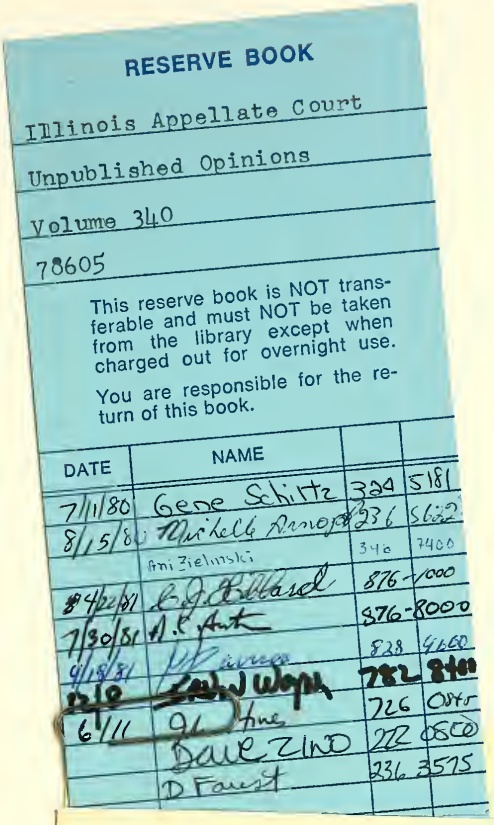
Attached to one of the affidavits of plaintiff in opposition to the motion for summary judgment was a copy of the contract of sale entered into between defendant and the purchaser. In said contract, in addition to the sale of the buildings and land, there was provided an inventory of the machinery and equipment, cans, cartons, labels, warehouse and shipping supplies; the right, title and interest in trade-marks, brands, labels used by defendant in connection

with the distribution and sale of its products; the right to use the name "Fuhrmann Canning Company"; the right to sell canned foods packed under labels and trade-marks previously used by defendant; a list of customers to whom defendant had been selling its products; records of production in cases packed by defendant at Berlin and Appleton; the right to obtain services of employees under contract with defendant; and a negative covenant that Jacob, John and Albert Fuhrmann, associated with the defendant company, and defendant refrain from directly or indirectly engaging in the business of processing, preserving or canning food products within a radius of fifty miles of the Berlin and Appleton plants for a period of four years from June, 1948.

The contract of sale appearing in the record provided the sales price of $550,000 to be paid by the issuance by "Stokley" (purchaser) to Fuhrmann of an aggregate of 26,191 shares of the cumulative prior preference stock of Stokley at an agreed value of $21.00 per share; that for the Berlin plant, consisting of buildings, machinery and equipment, including spare parts and all office equipment, completely equipped for operation as a canning plant, a consideration of 7,300 shares of the prior preference stock of Stokley, of which 300 shares represent payment for said land, 2500 shares for said buildings, and 4500 shares for machinery and equipment; that for the Appleton plant the consideration to be paid was 18,320 shares of the prior preference stock of Stokley, of which 400 shares represent payment of said land, 7,000 shares for said buildings, and 10,920 shares

for said machinery and equipment. For the automotive equipment described in an inventory attached, Stokley agreed to pay a consideration of 571 shares of the prior preference stock of Stokley. There was a further recital in paragraph 2 (d) in said contract: "There is no broker or agent to whom any commission or finders' fees are payable in connection with any of the transactions to which this agreement relates."

The partial summary judgment order entered recited that the court considered the pleadings, the motion for summary judgment and affidavits in support of and in opposition thereto, and found that plaintiff was not licensed to act as a real estate broker or salesman; that the contract of sale provided for the sale of certain assets, consisting of land and buildings, machinery and equipment, as to which machinery and equipment the court makes no finding as to whether they were attached so as to become a part of the realty; that as to the sale of that portion of the assets consisting of land and buildings, plaintiff is not entitled to recover any commission; and that as to the claimed compensation for the sale of assets consisting of machinery and equipment, the question of whether or not said machinery and equipment was so attached to the realty as to constitute a part thereof was an issue of fact to be determined upon a trial of the cause. It ordered that as to the sales price for the land and buildings, amounting to $214,200, plaintiff was not to recover any commission, and as to the remaining portion of plaintiff's demand the cause should proceed to trial as though the action was brought for that only.



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